MEMORANDUM

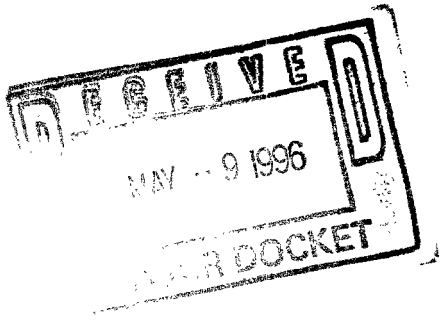
SUBJECT: requested information related to 40 CFR part 71

FROM: Candace Carraway

TO: Art Fraas

DATE: February 12, 1996

Per your request, attached are copies of the memorandum on limiting potential to emit and the white paper.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

FEB 13 1995

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

NOTE TO: SEE BELOW

SUBJECT: January 25, 1995 Memorandum Regarding Potential to Emit

Recently, you received a memorandum entitled, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)" dated January 25, 1995. Subsequently, it has come to our attention that there were two errors on page 9 of this memorandum as follows:

(1) In the sentence beginning "For this 2-year period such sources...," insert the words "(i.e., those emitting under the 50 percent threshold)"

(2) In the sentence beginning "To qualify...," insert the words "transition period" after the word "entire" and delete the phrase "as major sources and would not be required to obtain a permit that limits their potential to emit that would be considered to be adequate during this transition period."

Please include the corrected page 9 when distributing this memorandum.

If you have any questions or need further assistance, please contact Timothy Smith of my staff at 919-541-4718.

Robert G. Kellam
Acting Director
Information Transfer and
Planning Integration Division

Attachment

Addressees:
Air Division Director, Regions I-X

delays in State adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps do not create adverse consequences for States or for sources, EPA is announcing a transition policy for a period up to two years from the date of this memorandum. The EPA intends to make this transition policy available at the discretion of the State or local agency to the extent there are sources which the State believes can benefit from such a transition policy. The transition period will extend from now until the gaps in program implementation are filled, but no later than January 1997. Today's guidance, which EPA intends to codify through a notice and comment rulemaking, provides States discretion to use the following options for satisfying potential to emit requirements during this transition period.

1. Sources maintaining emissions below 50 percent of all applicable major source requirements. For sources that typically and consistently maintain emissions significantly below major source levels, relatively few benefits would be gained by making such sources subject to major source requirements under the Act. For this reason, many States are developing exclusionary rules and general permits to create simple, streamlined means to ensure that these sources are not considered major sources. To ease the burden on States' implementation of title V, and to ensure that delays in EPA's approval of these types of programs will not cause an administrative burden on the States, EPA is providing a 2-year transition period for sources that maintain their actual emissions, for every consecutive 12-month period (beginning with the 12 months immediately preceding the date of this memorandum), at levels that do not exceed 50 percent of any and all of the major stationary source thresholds applicable to that source. A source that exceeds the 50 percent threshold, without complying with major source requirements of the Act (or without otherwise limiting its potential to emit), could be subject to enforcement. For this 2-year period, such sources (i.e., those emitting under the 50 percent threshold) would not be treated as major sources and would not be required to obtain a permit that limits their potential to emit. To qualify under this transition policy, sources must maintain adequate records on site to demonstrate that emissions are maintained below these thresholds for the entire transition period. Consistent with the California approach, EPA believes it is appropriate for the amount of recordkeeping to vary according to the level of emissions (see paragraphs 1.2 and 4.2 of the attached rule).

2. Larger sources with State limits. For the 2-year transition period, restrictions contained in State permits issued to sources above the 50 percent threshold would be treated by EPA as acceptable limits on potential to emit, provided: (a) the permit is enforceable as a practical matter; (b) the source owner submits a written certification to EPA that it will comply with

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 25 1995

MEMORANDUM

SUBJECT: Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement (2241)

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

Many stationary source requirements of the Act apply only to "major" sources. Major sources are those sources whose emissions of air pollutants exceed threshold emissions levels specified in the Act. For instance, section 112 requirements such as MACT and section 112(g) and title V operating permit requirements largely apply only to sources with emissions that exceed specified levels and are thus major. To determine whether a source is major, the Act focuses not only on a source's actual emissions, but also on its potential emissions. Thus, a source that has maintained actual emissions at levels below the major source threshold could still be subject to major source requirements if it has the potential to emit major amounts of air pollutants. However, in situations where unrestricted operation of a source would result in a potential to emit above major-source levels, such sources may legally avoid program requirements by taking federally-enforceable permit conditions which limit emissions to levels below the applicable major source threshold. Federally-enforceable permit conditions, if violated, are subject to enforcement by the Environmental Protection Agency (EPA) or by

citizens in addition to the State or Local agency.

As the deadlines for complying with MACT standards and title V operating permits approach, industry and State and local air pollution agencies have become increasingly focused on the need to adopt and implement federally-enforceable mechanisms to limit emissions from sources that desire to limit potential emissions to below major source levels. In fact, there are numerous options available which can be tailored by the States to provide such sources with simple and effective ways to qualify as minor sources. Because there appears to be some confusion and questions regarding how potential to emit limits may be established, EPA has decided to: (1) outline the available approaches to establishing potential to emit limitations, (2) describe developments related to the implementation of these various approaches, and (3) implement a transition policy that will allow certain sources to be treated as minor for a period of time sufficient for these sources to obtain a federally-enforceable limit.

Federal enforceability is an essential element of establishing limitations on a source's potential to emit. Federal enforceability ensures the conditions placed on emissions to limit a source's potential to emit are enforceable by EPA and citizens as a legal and practical matter, thereby providing the public with credible assurances that otherwise major sources are not avoiding applicable requirements of the Act. In order to ensure compliance with the Act, any approaches developed to allow sources to avoid the major source requirements must be supported by the Federal authorities granted to citizens and EPA. In addition, Federal enforceability provides source owners and operators with assurances that limitations they have obtained from a State or local agency will be recognized by EPA.

The concept of federal enforceability incorporates two separate fundamental elements that must be present in all limitations on a source's potential to emit. First, EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to Act programs. This requirement is based both on EPA's general interest in having the power to enforce "all relevant features of SIP's that are necessary for attainment and maintenance of NAAQS and PSD increments" (see 54 FR 27275, citing 48 FR 38748, August 25, 1983) as well as the specific goal of using national enforcement to ensure that the requirements of the Act are uniformly implemented throughout the nation (see 54 FR 27277). Second, limitations must be enforceable as a practical matter.

It is important to recognize that there are shared responsibilities on the part of EPA, State, and local agencies, and on source owners to create and implement approaches to creating acceptable limitations on potential emissions. The lead

responsibility for developing limitations on potential emissions rests primarily with source owners and State and local agencies. At the same time, EPA must work together with interested parties, including industry and States to ensure that clear guidance is established and that timely Federal input, including Federal approval actions, is provided where appropriate. The guidance in this memorandum is aimed towards continuing and improving this partnership.

Available Approaches for Creating Federally-enforceable Limitations on the Potential to Emit

There is no single "one size fits all" mechanism that would be appropriate for creating federally-enforceable limitations on potential emissions for all sources in all situations. The spectrum of available mechanisms should, however, ensure that State and local agencies can create federally-enforceable limitations without undue administrative burden to sources or the agency. With this in mind, EPA views the following types of programs, if submitted to and approved by EPA, as available to agencies seeking to establish federally-enforceable potential to emit limits:[1]

1. Federally-enforceable State operating permit programs (FESOPs) (non-title V). For complex sources with numerous and varying emission points, case-by-case permitting is generally needed for the establishment of limitations on the source's potential to emit. Such case-by-case permitting is often accomplished through a non-title V federally-enforceable State operating permit program. This type of permit program, and its basic elements, are described in guidance published in the Federal Register on June 28, 1989 (54 FR 27274). In short, the program must: (a) be approved into the SIP, (b) impose legal obligations to conform to the permit limitations, (c) provide for limits that are enforceable as a practical matter, (d) be issued in a process that provides for review and an opportunity for comment by the public and by EPA, and (e) ensure that there is no relaxation of otherwise applicable Federal requirements. The EPA believes that these type of programs can be used for both criteria pollutants and hazardous air pollutants, as described in the memorandum, "Approaches to Creating Federally-Enforceable Emissions Limits," November 3, 1993. This memorandum (referred to below as the November 1993 memorandum) is included for your information as Attachment 1. There are a number of important clarifications with respect to hazardous air pollutants subsequent to the November 1993 memorandum which are discussed

---

[1]This is not an exhaustive list of considerations affecting potential to emit. Other federally-enforceable limits can be used, for example, source-specific SIP revisions. For brevity, we have included those which have the widest applicability.

below (see section entitled "Limitations on Hazardous Air Pollutants").

2. Limitations established by rules. For less complex plant sites, and for source categories involving relatively few operations that are relatively similar in nature, case-by-case permitting may not be the most administratively efficient approach to establishing federally-enforceable restrictions. One approach that has been used is to establish a general rule which creates federally-enforceable restrictions at one time for many sources (these rules have been referred to as "exclusionary" rules and by some permitting agencies as "prohibitory" rules). A specific suggested approach for volatile organic compounds (VOC) limits by rule was described in EPA's memorandum dated October 15, 1993 entitled "Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based Upon Volatile Organic Compound (VOC) Use." An example of such an exclusionary rule is a model rule developed for use in California. (The California model rule is attached, along with a discussion of its applicability to other situations--see Attachment 2). Exclusionary rules are included in a State's SIP and generally become effective upon approval by EPA.

3. General permits. A concept similar to the exclusionary rule is the establishment of a general permit for a given source type. A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit provides for conditions limiting potential to emit in a one-time permitting process, and thus avoids the need to issue separate permits for each source within the covered source type or category. Although this concept is generally thought of as an element of a title V permit program, there is no reason that a State or local agency could not submit a general permit program as a SIP submittal aimed at creating potential to emit limits for groups of sources. Additionally, general permits can be issued under the auspices of a SIP-approved FESOP. The advantage of a general permit, when compared to an exclusionary rule, is that upon approval by EPA of the State's permit program, a general permit could be written for one or more additional source types without triggering the need for the formal SIP revision process.

4. Construction permits. Another type of case-by-case permit is a construction permit. These permits generally cover new and modified sources, and States have developed such permit programs as an element of their SIP's. As described in the November 1993 memorandum, these State major and minor new source review (NSR) construction permits can provide for federally-enforceable limitations on a source's potential to emit. Further discussion of the use of minor source NSR programs is contained in EPA's letter to Jason Grumet, NESCAUM, dated November 2, 1994,

which is contained in Attachment 3. As noted in this letter, the usefulness of minor NSR programs for the creation of potential to emit limitations can vary from State to State, and is somewhat dependent on the scope of a State's program.

5. Title V permits. Operating permits issued under the Federal title V operating permits program can, in some cases, provide a convenient and readily available mechanism to create federally-enforceable limits. Although the applicability date for part 70 permit programs is generally the driving force for most of the current concerns with respect to potential to emit, there are other programs, such as the section 112 air toxics program, for which title V permits may themselves be a useful mechanism for creating potential to emit limits. For example, many sources will be considered to be major by virtue of combustion emissions of nitrogen oxides or sulfur dioxide, and will be required to obtain part 70 permits. Such permits could be used to establish federally-enforceable limitations that could ensure that the source is not considered a major source of hazardous air pollutants.

Practicable Enforceability

If limitations--whether imposed by SIP rules or through individual or general permits--are incomplete or vague or unsupported by appropriate compliance records, enforcement by the States, citizens and EPA would not be effective. Consequently, in all cases, limitations and restrictions must be of sufficient quality and quantity to ensure accountability (see 54 FR 27283).

The EPA has issued several guidance documents explaining the requirements of practicable enforceability (e.g., "Guidance on Limiting Potential to Emit in New Source Permitting," June 13, 1989; memorandum from John Rasnic entitled "Policy Determination on Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project," March 13, 1992). In general, practicable enforceability for a source-specific permit means that the permit's provisions must specify: (1) A technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting. For rules and general permits that apply to categories of sources, practicable enforceability additionally requires that the provisions: (1) identify the types or categories of sources that are covered by the rule; (2) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (3) specify the enforcement consequences relevant to the rule. More specific guidance on these enforceability principles as they apply to rules and general permits is provided in Attachment 4.

Limitations on Hazardous Air Pollutants (HAP)

There are a number of important points to recognize with respect to the ability of existing State and local programs to create limitations for the 189 HAP listed in (or pursuant to) section 112(b) of the Act, consistent with the definitions of "potential to emit" and "federally-enforceable" in 40 CFR 63.2 (promulgated March 16, 1994, 59 FR 12408 in the part 63 General Provisions). The EPA believes that most State and local programs should have broad capabilities to handle the great majority of situations for which a potential to emit limitation on HAP is needed.

First, it is useful to note that the definition of potential to emit for the Federal air toxics program (see the subpart A "general provisions," section 63.2) considers, for purposes of controlling HAP emissions, federally-enforceable limitations on criteria pollutant emissions if "the effect such limitations would have on "[hazardous air pollutant] . . . emissions" is federally-enforceable (emphasis added). There are many examples of such criteria pollutant emission limits that are present in federally-enforceable State and local permits and rules. Examples would include a limitation constraining an operation to one (time limit specified) shift per day or limitations that effectively limit operations to 2000 hours per year. Other examples would include limitations on the amount of material used, for example a permit limitation constraining an operation to using no more than 100 gallons of paint per month. Additionally, federally-enforceable permit terms that, for example, required an incinerator to be operated and maintained at no less than 1600 degrees would have an obvious "effect" on the HAP present in the inlet stream.

Another federally-enforceable way criteria pollutant limitations affect HAP can be described as a "nested" HAP limit within a permit containing conditions limiting criteria pollutants. For example, the particular VOC's within a given operation may include toluene and xylene, which are also HAP. If the VOC-limiting permit has established limitations on the amount of toluene and xylene used as the means to reduce VOC, those limitations would have an obvious "effect" on HAP as well.

In cases as described above, the "effect" of criteria pollutant limits will be straightforward. In other cases, information may be needed on the nature of the HAP stream present. For example, a limit on VOC that ensured total VOC's of 20 tons per year may not ensure that each HAP present is less than 10 tons per year without further investigation. While the EPA intends to develop further technical guidance on situations for which additional permit terms and conditions may be needed to ensure that the "effect" is enforceable as a practical matter, the EPA intends to rely on State and local agencies to employ

care in drafting enforceable requirements which recognize obvious environmental and health concerns.

There are, of course, a few important pollutants which are HAP but are not criteria pollutants. Example of these would include methylene chloride and other pollutants which are considered nonreactive and therefore exempt from coverage as VOC's. Especially in cases where such pollutants are the only pollutants present, criteria pollutant emission limitations may not be sufficient to limit HAP. For such cases, the State or local agency will need to seek program approval under section 112(l) of the Act.

Section 112(l) provides a clear mechanism for approval of State and local air toxics programs for purposes of establishing HAP-specific PTE limits. The EPA intends, where appropriate, that in approving permitting programs into the SIP, to add appropriate language citing approval pursuant to section 112(l) as well. An example illustrating section 112(l) approval is the approval of the State of Ohio's program for limiting potential to emit (see 59 FR 53587, October 25, 1994). In this notice, EPA granted approval under section 112(l) for hazardous air pollutants aspects of a State program for limiting potential to emit. Such language can be added to any federally-enforceable State operating permit program, exclusionary rule, or NSR program update SIP approval notice so long as the State or local program has the authority to regulate HAP and meets other section 112(l) approval criteria. Transition issues related to such section 112(l) approvals are discussed below.

Determination of Maximum Capacity

While EPA and States have been calculating potential to emit for a number of years, EPA believes that it is important at this time to provide some clarification on what is meant in the definition of potential to emit by the "maximum capacity of a stationary source to emit under its physical and operational design." Clearly, there are sources for which inherent physical limitations for the operation restrict the potential emissions of individual emission units. Where such inherent limitations can be documented by a source and confirmed by the permitting agency, EPA believes that States have the authority to make such judgements and factor them into estimates of a stationary source's potential to emit.

The EPA believes that the most straightforward examples of such inherent limitations is for single-emission unit type operations. For example, EPA does not believe that the "maximum capacity" language requires that owner of a paint spray booth at a small auto body shop must assume that (even if the source could be in operation year-round) spray equipment is operated 8760 hours per year in cases where there are inherent physical

limitations on the number of cars that can be painted within any given period of time. For larger sources involving multiple emissions units and complex operations, EPA believes it can be more problematic to identify the inherent limitations that may exist.

The EPA intends, within its resource constraints, to issue technical assistance in this area by providing information on the type of operational limits that may be considered acceptable to limit the potential to emit for certain individual small source categories.

Transition Guidance for Section 112 and Title V Applicability

Most, if not all, States have recognized the need to develop options for limiting the potential emissions of sources and are moving forward with one or more of the strategies described in the preceding sections in conjunction with the submission and implementation of their part 70 permit programs. However, EPA is aware of the concern of States and sources that title V or section 112 implementation will move ahead of the development and implementation of these options, leaving sources with actual emissions clearly below the major source thresholds potentially subject to part 70 and other major source requirements. Gaps could theoretically occur during the time period it takes for a State program to be designed and administratively adopted by the State, approved into the SIP by EPA, and implemented as needed to cover individual sources.

The EPA is committed to aiding all States in developing and implementing adequate, streamlined, and cost-effective vehicles for creating federally-enforceable limits on a source's potential emissions by the time that section 112 or title V requirements become effective. To help bridge any gaps, EPA will expedite its reviews of State exclusionary rules and operating permit rules by, among other things, coordinating the approval of these rules with the approval of the State's part 70 program and by using expeditious approval approaches such as "direct final" Federal Register notices to ensure that approval of these programs does not lag behind approval of the part 70 program.

In addition, in such approval notices EPA will affirm any limits established under the State's program since its adoption by the State but prior to Federal approval if such limits were established in accordance with the procedures and requirements of the approved program. An example of language affirming such limits was recently used in approving an Illinois SIP revision (see 57 FR 59931, included as Attachment 5).

The EPA remains concerned that even with expedited approvals and other strategies, sources may face gaps in the ability to acquire federally-enforceable potential to emit limits due to

delays in State adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps do not create adverse consequences for States or for sources, EPA is announcing a transition policy for a period up to two years from the date of this memorandum. The EPA intends to make this transition policy available at the discretion of the State or local agency to the extent there are sources which the State believes can benefit from such a transition policy. The transition period will extend from now until the gaps in program implementation are filled, but no later than January 1997. Today's guidance, which EPA intends to codify through a notice and comment rulemaking, provides States discretion to use the following options for satisfying potential to emit requirements during this transition period.

1. Sources maintaining emissions below 50 percent of all applicable major source requirements. For sources that typically and consistently maintain emissions significantly below major source levels, relatively few benefits would be gained by making such sources subject to major source requirements under the Act. For this reason, many States are developing exclusionary rules and general permits to create simple, streamlined means to ensure that these sources are not considered major sources. To ease the burden on States' implementation of title V, and to ensure that delays in EPA's approval of these types of programs will not cause an administrative burden on the States, EPA is providing a 2-year transition period for sources that maintain their actual emissions, for every consecutive 12-month period (beginning with the 12 months immediately preceding the date of this memorandum), at levels that do not exceed 50 percent of any and all of the major stationary source thresholds applicable to that source. A source that exceeds the 50 percent threshold, without complying with major source requirements of the Act (or without otherwise limiting its potential to emit), could be subject to enforcement. For this 2-year period, such sources would not be treated as major sources and would not be required to obtain a permit that limits their potential to emit. To qualify under this transition policy, sources must maintain adequate records on site to demonstrate that emissions are maintained below these thresholds for the entire as major sources and would not be required to obtain a permit that limits their potential to emit that would be considered to be adequate during this transition period. Consistent with the California approach, EPA believes it is appropriate for the amount of recordkeeping to vary according to the level of emissions (see paragraphs 1.2 and 4.2 of the attached rule).

2. Larger sources with State limits. For the 2-year transition period, restrictions contained in State permits issued to sources above the 50 percent threshold would be treated by EPA as acceptable limits on potential to emit, provided: (a) the permit is enforceable as a practical matter; (b) the source owner submits a written certification to EPA that it will comply with

the limits as a restriction on its potential to emit; and (c) the source owner, in the certification, accepts Federal and citizen enforcement of the limits (this is appropriate given that the limits are being taken to avoid otherwise applicable Federal requirements). Such limits will be valid for purposes of limiting potential to emit from the date the certification is received by EPA until the end of the transition period. States interested in making use of this portion of the transition policy should work with their Regional Office to develop an appropriate certification process.

3. Limits for noncriteria HAP. For noncriteria HAP for which no existing federally-approved program is available for the creation of federally-enforceable limits, the 2-year transition period provides for sufficient time to gain approval pursuant to section 112(l). For the 2-year transition period, State restrictions on such noncriteria pollutants issued to sources with emissions above the 50 percent threshold would be treated by EPA as limiting a source's potential to emit, provided that: (a) the restrictions are enforceable as a practical matter; (b) the source owner submits a written certification to EPA that it will comply with the limits as a restriction on its potential to emit; and (c) the source owner, in the certification, accepts Federal and citizen enforcement of the limits. Such limits will be valid for purposes of limiting potential to emit from the date the certification is received by EPA until the end of the transition period.

The Regional Offices should send this memorandum, including the attachments, to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. Regional Office staff may contact Timothy Smith of the Integrated Implementation Group at 919-541-4718, or Clara Poffenberger with the Air Enforcement Division at 202-564-8709.

Attachments

cc: Air Branch Chief, Region I-X
Regional Counsels

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

NOV 3 1993

MEMORANDUM

SUBJECT: Approaches to Creating Federally-Enforceable Emissions Limits

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

The new operating permits program under title V of the Clean Air Act (Act), combined with the additional and lower thresholds for "major" sources also provided by the 1990 Amendments to the Act, has led to greatly increased interest by State and local air pollution control agencies, as well as sources, in obtaining federally-enforceable limits on source potential to emit air pollutants. Such limits entitle sources to be considered "minor" for the purposes of title V permitting and various other requirements of the Act. Numerous parties have identified this as a high priority concern potentially involving thousands of sources in each of the larger States.

The issue of creating federally-enforceable emissions limits has broad implications throughout air programs. Although many of the issues mentioned above have arisen in the context of the title V permits program, the same issues exist for other programs, including those under section 112 of the Act. As discussed below, traditional approaches to creating federally-enforceable emissions limits may be unnecessarily burdensome and time-consuming for certain types and sizes of sources. In addition, they have been of limited usefulness with respect to creating such limits for emissions of hazardous air pollutants (HAP's).

The purpose of this memorandum is to respond to these needs by announcing the availability of two further approaches to creating federally-enforceable emissions limits: the extension of existing criteria pollutant program mechanisms for HAP program

purposes, and the creation of certain classes of standardized emissions limits by rule. We believe that these options are responsive to emerging air program implementation issues and provide a reasonable balance between the need for administrative streamlining and the need for emissions limits that are technically sound and enforceable.

Background

Various regulatory options already exist for the creation of federally-enforceable limits on potential to emit. These were summarized in a September 18, 1992 memorandum from John Calcagni, Director, Air Quality Management Division. That memorandum identified the five regulatory mechanisms generally seen as available. These are: State major and minor new source review (NSR) permits [if the NSR program has been approved into the State implementation plan (SIP) and meets certain procedural requirements]; operating permits based on programs approved into the SIP pursuant to the criteria in the June 28, 1989 Federal Register (54 FR 27274); and title V permits (including general permits). Also available are SIP limits for individual sources and limits for HAP's created through a State program approved pursuant to section 112(l) of the Act.

Regional Office and State air program officials realize that these five options are generally workable, but feel that the programs emerging from the 1990 Amendments present certain further needs that are not well met. They note that NSR is not always available, title V permitting can be more rigorous than appropriate for those sources that are in fact quite small, and that general permits have limitations in their usefulness. The use of State operating permits approved into the SIP pursuant to the June 28, 1989 Federal Register is generally considered to be a promising option for some of these transactions; however, these programs do not regulate toxics directly.

State Operating Permits for Both Criteria Pollutants and HAP's

As indicated above, State operating permits issued by programs approved into the SIP pursuant to the process provided in the June 28, 1989 Federal Register are recognized as federally enforceable. This is a useful option, but has historically been viewed as limited in its ability to directly create emissions limits for HAP's because of the SIP focus on criteria pollutants.

Since that option was created, however, section 112 of the Act has been rewritten, creating significant new regulatory requirements and conferring additional responsibilities and authorities upon the Environmental Protection Agency (EPA) and the States. Section 112 now mandates a wide range of activities:

source-specific preconstruction reviews, areawide approaches to controlling risk, provisions for permitting pursuant to the title V permitting program, and State program provisions in section 112(l) that are similar to aspects of the SIP program. A result of these changes is that implementation of toxics programs will entail the use of many of the same administrative mechanisms as have been in use for the criteria pollutant programs.

Upon further analysis of these new program mandates and corresponding authorities, EPA concludes that section 112 of the Act, including section 112(l), authorizes it to recognize these same State operating permits programs for the creation of federally-enforceable emissions limits in support of the implementation of section 112. Congress recognized, and longstanding State practice confirms, that operating permits are core-implementing mechanisms for air quality program requirements. This was EPA's basis for concluding that section 110 of the Act authorizes the recognition and approval into the SIP of operating permits pursuant to the June 28, 1989 promulgation, even though section 110 did not expressly provide for such a program. Similarly, broad provision of section 112(l) for "a program for the implementation and enforcement . . . of emission standards and other requirements for air pollutants subject to this section" provides a sound basis for EPA recognition of State operating permits for implementation and enforcement of section 112 requirements in the same manner as these permitting processes were recognized pursuant to section 110.

In implementing this authority to approve State operating permits programs pursuant to section 112, it should be noted that the specific criteria for what constitutes a federally-enforceable permit are also the same as for the existing SIP programs. The June 28, 1989 Federal Register essentially addressed in a generic sense the core criteria for creating federally-enforceable emissions limits in operating permits: appropriate procedural mechanisms, including public notice and opportunity for comment, statutory authority for EPA approval of the State program, and enforceability as a practical matter. The EPA did this in the context of SIP development, not because these criteria are specific to the SIP, but because section 110 of the Act was seen as our only certain statutory basis for this prior to the 1990 Amendments. Based on the discussion above, States can extend or develop State operating permits programs for toxics pursuant to the criteria set forth in the June 28, 1989 Federal Register. The EPA is also evaluating analogous opportunities to enhance State NSR programs to address toxics and will address this in future guidance.

This is a significant opportunity to limit directly the emissions of HAP's. It also offers the advantage of the administrative efficiencies that arise from using existing

15

administrative mechanisms, as opposed to creating additional ones.

States are encouraged to consult with EPA Regional Offices to discuss the details of adapting their current programs to carry out these additional functions. The EPA will consider State permitting programs meeting the criteria in the June 28, 1989 Federal Register as being approvable for HAP program functions as well. States may submit their programs for implementing this process with their part 70 program submittals, or at such other time as they choose. The EPA has various options for administratively recognizing these State program submittals. The EPA plans initially to review these State programs as SIP review actions, but with official recognition pursuant to authorities in both sections 110 and 112. Once rulemaking pursuant to section 112(l) of the Act is completed, EPA expects to use the process developed in that rule for approving State programs for HAP's. The section 112(l) process may be especially useful prior to EPA approval and implementation of the State title V programs. The reader may wish to refer to the process for certain section 112(l) approvals proposed on May 19, 1993 (58 FR 29296) (see section 63.91).

The General Provisions (40 CFR part 63) establish the applicability framework for the implementation of section 112. In the final rule, EPA will indicate that State operating permits programs which meet the procedural requirements of the June 28, 1989 Federal Register can be used to develop federally-enforceable emissions limits for HAP's, thereby limiting a source's potential to emit. In addition, after we gain implementation experience, EPA will be evaluating the usefulness of further rulemaking to define more specific criteria by which this process may be used in the implementation of programs under section 112 of the Act. Any such rulemaking could similarly be incorporated into the General Provisions in part 63.

State-Standardized Processes Created by Rule to Establish Source-Specific, Federally-Enforceable Emissions Limits

State air program officials have highlighted specific types of sources that are of particular administrative concern because of their nature and number. These include sources whose emissions are primarily volatile organic compounds (VOC) arising from use of solvents or coatings, such as automobile body shops. Another example is fuel-burning sources that have low actual emissions because of limited hours of operation, but with the potential to emit sulfur dioxide in amounts sufficient to cause them to be classified as major sources.

The EPA recognizes that emissions limitations for some processes can be created through standardized protocols. For example, limitations on potential to emit could be established

for certain VOC sources on the basis of limits on solvent use, backed up by recordkeeping and by periodic reporting. Similarly, limitations on sulfur dioxide emissions could be based on specified sulfur content of fuel and the source's obligation to limit usage to certain maximum amounts. Limits on hours of operation may be acceptable for certain others sources, such as standby boilers. In all cases, of course, the technical requirements would need to be supported by sufficient compliance procedures, especially monitoring and reporting, to be considered enforceable.

The EPA concludes that such protocols could be relied on to create federally-enforceable limitations on potential to emit if adopted through rulemaking and approved by EPA. Although such an approach is appropriate for only a limited number of source categories, these categories include large numbers of sources, such as dry cleaners, auto body shops, gas stations, printers, and surface coaters. If such standardized control protocols are sufficiently reliable and replicable, EPA and the public need not be involved in their application to individual sources, as long as the protocols themselves have been subject to notice and opportunity to comment and have been approved by EPA into the SIP.

To further illustrate this concept and to provide implementation support to the States, EPA has recently released guidance on one important way of using this process. This document, entitled "Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based on Volatile Organic Compound Use," was issued by D. Kent Berry, Acting Director, Air Quality Management Division, on October 15, 1993. It describes approvable processes by which States can create federally-enforceable emissions limits for VOC for large numbers of sources in a variety of source categories.

States have flexibility in their choice of administrative process for implementation. In some cases, it may be adequate for a State to apply these limits to individual sources through a registration process rather than a permit. A source could simply submit a certification to the State committing to comply with the terms of an approved protocol. Violations of these certifications would constitute SIP violations, in the case of protocols approved into the SIP, and be subject to the same enforcement mechanisms as apply in the case of any other SIP violation. Such violations would, of course, also subject the source to enforcement for failure to comply with the requirements that apply to major sources, such as the requirement to obtain a title V permit or comply with various requirements of section 112 of the Act.

Some States have also indicated an interest in more expansive approaches to implementing this concept, such as making

presumptive determinations of control equipment efficiency with respect to particular types of sources and pollutants. While such approaches are more complicated and present greater numbers of concerns in the EPA review process, they offer real potential if properly crafted. The EPA will evaluate State proposals and approve them if they are technically sound and enforceable as a practical matter.

States may elect to use this approach to create federally-enforceable emissions limits for sources of HAP's as well. Based on the same authorities in section 112 of the Act, as cited above in the case of operating permits, EPA can officially recognize such State program submittals. As with the operating permits option discussed in the preceding section, EPA plans initially to review these activities as SIP revisions, but with approval pursuant to both sections 110 and 112 of the Act, and approve them through the section 112(l) process when that rule is final.

Implementation Guidance

As indicated above, the creation of federally-enforceable limits on a source's potential to emit involves the identification of the procedural mechanisms for these efforts, including the statutory basis for their approval by EPA, and the technical criteria necessary for their implementation. Today's guidance primarily addresses the procedural mechanisms available and the statutory basis for EPA approval.

The EPA will be providing further information with respect to the implementation of these concepts. As described above, the first portion of this guidance, addressing limits on VOC emissions, was issued on October 15, 1993. My office is currently working with Regional Offices and certain States in order to assist in the development of program options under consideration by those States. We will provide technical and regulatory support to other State programs and will make the results of these efforts publicly available through the Office of Air Quality Planning and Standards (OAQPS) Technology Transfer Network bulletin board.

We will provide further support through the release of a document entitled "Enforceability Requirements for Limiting Potential to Emit Through SIP Rules and General Permits," which is currently undergoing final review within EPA. In addition, EPA will be highlighting options for use of existing technical guidance with respect to creating sound and enforceable emissions limits. An important example of such guidance is the EPA "Blue Book," which has been in use by States for the past 5 years as part of their VOC control programs.

States are encouraged to discuss program needs with their EPA Regional Offices. The OAQPS will work with them in addressing approvals. As indicated, additional technical guidance for implementing these approaches is underway and will be made publicly available soon. For further information, please call Kirt Cox at (919) 541-5399.

cc: Air Branch Chief, Regions I-X
Regional Counsel, Regions I-X
OAQPS Division Directors
A. Eckert
M. Winer
A. Schwartz
E. Hoerath

17

Attachment 2
California Example Rule

Background

State agencies and local agencies (such as the Air Pollution Control Districts in California) can adopt rules which place emissions limitations on a category of sources through a combination of limitations and compliance requirements. These rules, if practicably enforceable, adopted with adequate public process and approved into the SIP, can validly limit potential to emit. Moreover, because State or local rules can cover many sources with a single regulatory action, they are well-suited to cover large populations of smaller sources. Many States are finding that a combination of SIP rules or general permits for smaller sources combined with individual permits for larger sources provides the simplest means of ensuring that minor source emissions are adequately limited.

Discussion of California Rule

The EPA, the California Air Pollution Control Officers Association and the California Air Resources Board recently completed development of a model rule for use by the California Air Pollution Control Districts. Because the rule contains several innovations, including covering all source categories, and should prove to be an inexpensive and efficient means of limiting the potential emissions of thousands of sources in California, the EPA believes that parts of the rule may be helpful for other States to review and consider.

The proposed rule is designed to place smaller sources under annual emissions limits which restrict their "potential to emit" and thus their exposure to "major source" requirements of the Clean Air Act. The rule ensures compliance with the annual limit through a series of recordkeeping and reporting requirements. These requirements are tapered to reduce burdens as source size decreases. The rule creates three levels of responsibility. The first tier requires both recordkeeping and reporting. The second tier requires only recordkeeping with no reporting. For instance, sources that emit only attainment pollutants which limit their emissions to below 25 tons per year have no reporting requirement. For sources under 5 tons per year (or 2 tons per year for a single hazardous air pollutant), there is no specified recordkeeping or reporting requirements although these sources must still maintain sufficient records to demonstrate their compliance with the rule.

To the extent possible, the recordkeeping requirements are itemized by source category and are designed to take advantage of records that sources are already likely to maintain. Through these measures, the rule should assure the public that the sources subject to the rule are properly maintaining their emissions below major source levels, while maximizing source

pollution control equipment to demonstrate compliance through the maintenance of general records on the unit and its operations. EPA has always been concerned with this provision since many pollution control units are only effective if specific operating procedures are followed. These specifics are best set and tracked in a source-specific, federally enforceable permit. For this reason, section 1.3 sunsets the applicability of the draft rule, after January 1, 1999, to pollution control equipment. For the coverage to continue beyond that date, a district must extend the provision. The EPA will disapprove the extension if the experience with the rule demonstrates that more specific conditions are needed to ensure that pollution control devices are being used properly and continuously.

Section 4.2(E): In general, EPA does not favor the use of generic or catch-all recordkeeping requirements for compliance purposes. There is a fear that the records necessary to show compliance for individual source categories will not be specified by the generic provision and thus will not be maintained. For this reason, EPA urges the Board and the Districts to evaluate regularly whether specific recordkeeping requirements should be developed for additional categories. As we noted during our negotiations, EPA will evaluate this question after the rule is in effect for three years and the EPA may seek -- through a SIP call or through other mechanisms -- to require additional recordkeeping requirements if there are implementation problems with this generic category. The districts may wish to add to the rule a provision which would authorize them to add recordkeeping requirements for additional source categories without a further SIP revision.

materials contain the following: methyl chloroform (1,1,1-trichloroethane), methylene chloride (dichloromethane), tetrachloroethylene (perchloroethylene), or trichloroethylene, but not more than 300 gallons of any one solvent-containing material;

3. ____ gallons of solvent-containing (or volatile organic compound containing) material used at a paint spray unit(s);[1]

4. 4,400,000 gallons of gasoline dispensed from equipment with Phase I and II vapor recovery systems;

5. 470,000 gallons of gasoline dispensed from equipment without Phase I and II vapor recovery systems;

6. 1,400 gallons of gasoline combusted;

7. 16,600 gallons of diesel fuel combusted;

8. 500,000 gallons of distillate oil combusted, or

9. 71,400,000 cubic feet of natural gas combusted.

Within 30 days of a written request by the District or the U.S. EPA, the owner or operator of a stationary source not maintaining records pursuant to sections 4.0 or 6.0 shall demonstrate that the stationary source's emissions or throughput are not in excess of the applicable quantities set forth in subsection A or B above.

1.3 Provision for Air Pollution Control Equipment: The owner or operator of a stationary source may take into account the operation of air pollution control equipment on the capacity of the source to emit an air contaminant if the equipment is required by Federal, State, or District rules and regulations or permit terms and conditions. The owner or operator of the stationary source shall maintain and operate such air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. This provision shall not apply after January 1, 1999 unless such operational limitation is federally enforceable or unless the District Board specifically extends this provision and it is submitted to the U.S. EPA. Such extension shall be valid unless, and until, the U.S. EPA disapproves the extension of this provision.

1.4 Exemption, Stationary Source Subject to Rule ____ (District Title V rule): This rule shall not apply to the following stationary sources:

A. Any stationary source whose actual emissions, throughput, or operation, at any time after the effective of this rule, is greater than the quantities specified in sections 3.1 or 6.1 below and which meets both of the following conditions:

---

[1]To be determined based on district SIP rules

19

2.0 DEFINITIONS

All terms shall retain the definitions provided under 40 CFR Part 70.2 [alternatively, the District Title V rule] unless otherwise defined herein.

2.1 12-month period: A period of twelve consecutive months determined on a rolling basis with a new 12-month period beginning on the first day of each calendar month.

2.2 Actual Emissions: The emissions of a regulated air pollutant from a stationary source for every 12-month period. Valid continuous emission monitoring data or source test data shall be preferentially used to determine actual emissions. In the absence of valid continuous emissions monitoring data or source test data, the basis for determining actual emissions shall be: throughputs of process materials; throughputs of materials stored; usage of materials; data provided in manufacturer's product specifications, material volatile organic compound (VOC) content reports or laboratory analyses; other information required by this rule and applicable District, State and Federal regulations; or information requested in writing by the District. All calculations of actual emissions shall use U.S. EPA, California Air Resources Board (CARB) or District approved methods, including emission factors and assumptions.

2.3 Alternative Operational Limit: A limit on a measurable parameter, such as hours of operation, throughput of materials, use of materials, or quantity of product, as specified in Section 6.0, Alternative Operational Limit and Requirements.

2.4 Emission Unit: Any article, machine, equipment, operation, contrivance or related groupings of such that may produce and/or emit any regulated air pollutant or hazardous air pollutant.

2.5 Federal Clean Air Act: The federal Clean Air Act (CAA) as amended in 1990 (42 U.S.C. section 7401 et seq.) and its implementing regulations.

2.6 Hazardous Air Pollutant: Any air pollutant listed pursuant to section 112(b) of the federal Clean Air Act.

2.7 Major Source of Regulated Air Pollutants (excluding HAPs): A stationary source that emits or has the potential to emit a regulated air pollutant (excluding HAPs) in quantities equal to or exceeding the lesser of any of the following thresholds:

A. 100 tons per year (tpy) of any regulated air pollutant;

B. 50 tpy of volatile organic compounds or oxides of nitrogen for a federal ozone nonattainment area classified as serious, 25 tpy for an area classified as severe, or 10 tpy for an area classified as extreme; and

C. 70 tpy of PM_{10} for a federal PM_{10} nonattainment area classified as serious.

Fugitive emissions of these pollutants shall be considered in calculating total emissions for stationary sources in accordance with 40 CFR Part 70.2 "Definitions- Major source(2)."

20

3. Any HAP subject to a District case-by-case emissions limitation determination for a new or modified source, prior to the U.S. EPA promulgation or scheduled promulgation of an emissions limitation shall be considered a regulated air pollutant when the determination is made pursuant to section 112(g)(2). In case-by-case emissions limitation determinations, the HAP shall be considered a regulated air pollutant only for the individual source for which the emissions limitation determination was made.

3.0 EMISSION LIMITATIONS

3.1 Unless the owner or operator has chosen to operate the stationary source under an alternative operational limit specified in section 6.1 below, no stationary source subject to this rule shall emit in every 12-month period more than the following quantities of emissions:

A. 50 percent of the major source thresholds for regulated air pollutants (excluding HAPs),

B. 5 tons per year of a single HAP,

C. 12.5 tons per year of any combination of HAPs, and

D. 50 percent of any lesser threshold for a single HAP as the U.S. EPA may establish by rule.

3.2 The APCO shall evaluate a stationary source's compliance with the emission limitations in section 3.1 above as part of the District's annual permit renewal process required by Health & Safety Code section 42301(e). In performing the evaluation, the APCO shall consider any annual process statement submitted pursuant to Section 5.0, Reporting Requirements. In the absence of valid continuous emission monitoring data or source test data, actual emissions shall be calculated using emissions factors approved by the U.S. EPA , CARB, or the APCO.

3.3 Unless the owner or operator has chosen to operate the stationary source under an alternative operational limit specified in section 6.1 below, the owner or operator of a stationary source subject to this rule shall obtain any necessary permits prior to commencing any physical or operational change or activity which will result in actual emissions that exceed the limits specified in section 3.1 above.

4.0 RECORDKEEPING REQUIREMENTS

Immediately after adoption of this rule, the owner or operator of a stationary source subject to this rule shall comply with any applicable recordkeeping requirements in this section. However, for a stationary source operating under an alternative operational limit, the owner or operator shall instead comply with the applicable recordkeeping and reporting requirements specified in Section 6.0, Alternative Operational Limit and Requirements. The recordkeeping requirements of this rule shall not replace any recordkeeping requirement

21

2. Information on the tank design and specifications including control equipment.

C. Combustion Emission Unit

The owner or operator of a stationary source subject to this rule that contains a combustion emission unit shall keep and maintain the following records:

1. Information on equipment type, make and model, maximum design process rate or maximum power input/output, minimum operating temperature (for thermal oxidizers) and capacity, control device(s) type and description (if any) and all source test information; and

2. A monthly log of hours of operation, fuel type, fuel usage, fuel heating value (for non-fossil fuels; in terms of BTU/lb or BTU/gal), percent sulfur for fuel oil and coal, and percent nitrogen for coal.

D. Emission Control Unit

The owner or operator of a stationary source subject to this rule that contains an emission control unit shall keep and maintain the following records:

1. Information on equipment type and description, make and model, and emission units served by the control unit;

2. Information on equipment design including where applicable: pollutant(s) controlled; control effectiveness; maximum design or rated capacity; inlet and outlet temperatures, and concentrations for each pollutant controlled; catalyst data (type, material, life, volume, space velocity, ammonia injection rate and temperature); baghouse data (design, cleaning method, fabric material, flow rate, air/cloth ratio); electrostatic precipitator data (number of fields, cleaning method, and power input); scrubber data (type, design, sorbent type, pressure drop); other design data as appropriate; all source test information; and

3. A monthly log of hours of operation including notation of any control equipment breakdowns, upsets, repairs, maintenance and any other deviations from design parameters.

E. General Emission Unit

The owner or operator of a stationary source subject to this rule that contains an emission unit not included in subsections A, B or C above shall keep and maintain the following records:

1. Information on the process and equipment including the following: equipment type, description, make and model; maximum design process rate or throughput; control device(s) type and description (if any);

2. Any additional information requested in writing by the APCO;

22

engine(s) shall not operate more than 5,200 hours in every 12-month period and shall not use more than 265,000 gallons of diesel fuel in every 12-month period.

b. For a federal ozone nonattainment area classified as serious, the emergency standby engine(s) shall not operate more than 2,600 hours in every 12-month period and shall not use more than 133,000 gallons of diesel fuel in every 12-month period.

c. For a federal ozone nonattainment area classified as severe, the emergency standby engine(s) shall not operate more than 1,300 hours in 12-month period and shall not use more than 66,000 gallons of diesel fuel in every 12-month period.

2. A monthly log of hours of operation, gallons of fuel used, and a monthly calculation of the total hours operated and gallons of fuel used in the previous 12 months shall be kept on site.

3. A copy of the monthly log shall be submitted to the APCO at the time of annual permit renewal. The owner or operator shall certify that the log is accurate and true.

6.2 The owner or operator of a stationary source subject to this rule shall obtain any necessary permits prior to commencing any physical or operational change or activity which will result in an exceedance of an applicable operational limit specified in section 6.1 above.

7.0 VIOLATIONS

7.1 Failure to comply with any of the applicable provisions of this rule shall constitute a violation of this rule. Each day during which a violation of this rule occurs is a separate offense.

7.2 A stationary source subject to this rule shall be subject to applicable federal requirements for a major source, including Rule ____ (District Title V rule) when the conditions specified in either subsections A or B below, occur:

A. Commencing on the first day following every 12-month period in which the stationary source exceeds a limit specified in section 3.1 above and any applicable alternative operational limit specified in section 6.1, above, or

B. Commencing on the first day following every 12-month period in which the owner or operator can not demonstrate that the stationary source is in compliance with the limits in section 3.1 above or any applicable alternative operational limit specified in section 6.1 above.

24

6.0 ALTERNATIVE OPERATIONAL LIMIT AND REQUIREMENTS

[The District may propose additional alternative operational limits]

The owner or operator may operate the permitted emission units at a stationary source subject to this rule under any one alternative operational limit, provided that at least 90 percent of the stationary source's emissions in every 12-month period are associated with the operation(s) limited by the alternative operational limit.

6.1 Upon choosing to operate a stationary source subject to this rule under any one alternative operational limit, the owner or operator shall operate the stationary source in compliance with the alternative operational limit and comply with the specified recordkeeping and reporting requirements.

A. The owner or operator shall report within 24 hours to the APCO any exceedance of the alternative operational limit.

B. The owner or operator shall maintain all purchase orders, invoices, and other documents to support information required to be maintained in a monthly log. Records required under this section shall be maintained on site for five years and be made available to District or U.S. EPA staff upon request.

C. Gasoline Dispensing Facility Equipment with Phase I and II Vapor Recovery Systems

The owner or operator shall operate the gasoline dispensing equipment in compliance with the following requirements:

1. No more than 7,000,000 gallons of gasoline shall be dispensed in every 12-month period.

2. A monthly log of gallons of gasoline dispensed in the preceding month with a monthly calculation of the total gallons dispensed in the previous 12 months shall be kept on site.

3. A copy of the monthly log shall be submitted to the APCO at the time of annual permit renewal. The owner or operator shall certify that the log is accurate and true.

D. Degreasing or Solvent-Using Unit

The owner or operator shall operate the degreasing or solvent-using unit(s) in compliance with the following requirements:

1. a. If the solvents do not include methyl chloroform (1,1,1-trichloroethane), methylene chloride (dichloromethane), tetrachloroethylene (perchloroethylene), or trichloroethylene, no more than 5,400 gallons of any combination of solvent-containing materials and no more than 2,200 gallons of any one solvent-containing material

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

NOV 2 1994

Mr. Jason Grumet
Executive Director, Northeast States
for Coordinated Air Use Management
129 Portland Street
Boston, Massachusetts 02114

Dear Mr. Grumet:

This is in response to Mr. Michael Bradley's March 22, 1994 letter to Mary Nichols seeking clarification of the Federal enforceability of State's existing minor new source review (NSR) programs. It is my understanding that some of the NESCAUM States are interested in using their existing minor NSR programs to limit a source's potential to emit so as to allow sources to legally avoid being considered a major source for title V purposes.

In my November 3, 1993 memorandum entitled "Approaches to Creating Federally-Enforceable Emission Limits," I described approaches that States could use to limit a source's potential to emit for title V purposes. While a number of approaches are acceptable, the Environmental Protection Agency (EPA) has promoted the use of State operating permits programs approved under sections 110 and 112(l), pursuant to the criteria set forth in the June 28, 1989 Federal Register. Among other things, these criteria include an opportunity for public and EPA review and require that permit conditions be practically enforceable. Several States have followed EPA's recommendation and have either adopted these requirements or are in the process of doing so.

The Agency recognizes the use of other approaches as well. In response to your question, EPA's position is that minor NSR permits issued under programs that have already been approved into the State implementation plan (SIP) are federally enforceable. Thus, EPA allows the use of federally-enforceable minor NSR permits to limit a source's potential to emit provided that the scope of a State's program allows for this and that the minor NSR permits are in fact enforceable as a practical matter.

Because minor NSR programs are essentially preconstruction review programs for new sources and modifications to existing sources, minor NSR programs can generally be used to limit a

source's potential emissions when such limits are taken in conjunction with a preconstruction permit action. In addition, please note that the term "modification" generally encompasses both physical changes and changes in the method of operation at an existing source (see Clean Air Act section 111(a)(4)). Thus, the scope of some, though not all, minor NSR programs is broad enough to be used to also limit a source's potential to emit for nonconstruction-related events. This occurs where the modification component of State programs extends to both physical changes and changes in the method of operation. In these cases, where a voluntary reduction in the method of operation (e.g., limit in hours of operation or production rate) by itself is considered a modification for minor NSR permitting, a source may reduce its hours of operation or production rate and make such a change federally enforceable through limits in its minor NSR permit.

Some States' minor NSR programs are written so as to preclude a source from limiting its potential to emit absent an increase in emissions. There may be other limitations on the scope of these programs as well. Since there is considerable variation among State minor NSR programs, a review of any individual State program would be necessary to determine its ability to limit a source's potential to emit. It may be beneficial for States to contact the appropriate EPA Regional Office if there are questions about the scope of the SIP-approved minor NSR program.

Minor NSR programs have generally been used in the past to limit a source's potential to emit for criteria pollutants. There is a growing need for sources to limit their potential to emit for toxic pollutants as well. The EPA is currently considering ways in which a State may limit the potential to emit of toxic pollutants, including possible uses of existing minor NSR programs. I plan to keep you and others aware of our efforts in this regard.

You should also be aware that a recent court ruling has called into question the Federal enforceability of a State minor NSR permit that does not meet the public participation requirements of current EPA regulations despite SIP approval of the State's program [see United States v. Marine Shale Processors, No. 90-1240 (E.D. La.) (bench ruling), June 15, 1994]. In that case involving extensive alleged violations of the permit terms, the court held that EPA could not enforce the terms of the minor NSR permit. The court subsequently ruled that the company could not rely on the permit to limit its potential to emit, and thus was liable for having failed to obtain a major

NSR permit. The outcome of this case suggests that States should proceed cautiously in relying on minor NSR programs to limit potential to emit where the program does not actually provide public participation.

In summary, EPA has provided guidance on approaches that are available to limit a source's potential to emit. The Agency recommends approaches that meet the criteria set forth in the June 28, 1989 Federal Register. Many States are taking action to adopt such programs. With respect to minor NSR permits, EPA believes that permits conditions issued in accordance with existing State minor NSR programs that have been approved into the SIP, and which are enforceable as a practical matter, are federally enforceable and can be used to limit potential to emit. Caution is advised, however, with respect to permits that do not meet procedural requirements. These programs are primarily preconstruction review programs although in many cases they can also limit a source's potential to emit in conjunction with operational changes.

As you have noted, title V issues are complicated and resource intensive. In order for the title V program to be successfully implemented, it is important that States and EPA work cooperatively in developing operating permits programs. Your comments and recommendations on program development issues are welcome.

We appreciate this opportunity to be of service and trust that this information will be helpful to you.

Sincerely,

John S. Seitz
Director
Office of Air Quality Planning
and Standards

cc: Air Division Director, Regions I-X

27

Attachment 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 25 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits

FROM: Kathie A. Stein, Director
Air Enforcement Division

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

Attached is a guidance document developed over the past year by the former Stationary Source Compliance Division in coordination with the Air Enforcement Division, Office of Air Quality Planning and Standards, OAR's Office of Policy Analysis and Review, and the Office of General Counsel, as well as with significant input from several Regions.

A number of permitting authorities have begun discussions with or have submitted programs for review by EPA that would provide alternative mechanisms for limiting potential to emit. Several authorities have submitted SIP rules and at least one State has been developing a State general permit approach. We believe that this guidance is important to assist the EPA Regions as well as States in approving and developing such approaches.

For additional information regarding this guidance, please contact me or Clara Poffenberger of my staff at (202) 564-8709.

cc: John Rasnic, Director
Manufacturing, Energy, and Transportation Division
Office of Compliance

Air Branch Chiefs, Regions I - X

JAN 25 1995

Enforceability Requirements for Limiting Potential to Emit Through SIP and §112 Rules and General Permits

Introduction

As several EPA guidances describe, there are several mechanisms available for sources to limit potential to emit. EPA guidances have also described the importance of practical enforceability of the means used to limit potential to emit. This guidance is intended to provide additional guidance on practical enforceability for such limits. We provide references for guidances on practical enforceability for permits and rules in general and provide guidance in this document for application of the same principles to "limitations established by rule or general permit," as described in the guidance document issued January 25, 1995, entitled "Options for Limiting Potential to Emit (PTE) of a Stationary Source under section 112 and Title V of the Clean Air Act (Act)." The description is as follows:

> Limitations established by rules. For less complex plant sites, and for source categories involving relatively few operations that are similar in nature, case-by-case permitting may not be the most administratively efficient approach to establishing federally enforceable restrictions. One approach that has been used is to establish a general rule which creates federally enforceable restrictions at one time for many sources (these rules have been referred to as "prohibitory" or "exclusionary" rules[1]). The concept of exclusionary rules is described in detail in the November 3, 1993 memorandum ["Approaches to Creating Federally Enforceable Emissions Limits," from John S. Seitz]. A specific suggested approach for VOC limits by rule was described in EPA's memorandum dated October 15, 1993 entitled "Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based Upon Volatile Organic Compound (VOC) Use." An example of such an exclusionary rule is a model rule developed for use in California. (The California model rule is attached, along with a discussion of its applicability to other situations--see Attachment 2). Exclusionary rules are included in a State's SIP or 112 program and generally become effective upon approval by the EPA.

---

[1] The EPA prefers the term "exclusionary rule" in that this phrase is a less ambiguous description of the overall purpose of these rules.

General permits. A concept similar to the exclusionary rule is the establishment of a general permit for a given source type. A general permit is a single permit that establishes terms and conditions that must be complied with by all sources subject to that permit. The establishment of a general permit could provide for emission limitations in a one-time permitting process, and thus avoid the need to issue separate permits for each source. Although this concept is generally thought of as an element of Title V permit programs, there is no reason that a State or local agency could not submit a general permit program as a SIP submittal aimed at creating synthetic minor sources. Additionally, FESOP [Federally Enforceable State Operating Permit, usually referring to Title I State Operating Permit Programs approved under the criteria established by EPA in the June 28, 1989 Federal Register notice, 54 FR 27274] programs can include general permits as an element of the FESOP program being approved into the SIP. The advantage of a SIP general permit, when compared to an exclusionary rule, is that upon approval by the EPA of the State's general permit program, a general permit could be written for an additional source type without triggering the need for the formal SIP revision process. (January 25, 1995, Seitz and Van Heuvelen memorandum, page 4.)

SIP or § 112 Rules

Source-category standards approved in the SIP or under 112, if enforceable as a practical matter, can be used as federally enforceable limits on potential to emit. Such provisions require public participation and EPA review. Once a specific source qualifies under the applicability requirements of the source-category rule, additional public participation is not required to make the limits federally enforceable as a matter of legal sufficiency since the rule itself underwent public participation and EPA review. The rule must still be enforceable as a practical matter in order to be considered federally enforceable. A source that violates this type of rule limiting potential to emit below major source thresholds or is later determined not to qualify for coverage under the rule, could be subject to enforcement action for violation of the rule and for constructing or operating without a proper permit (a part 70 permit, a New Source Review permit, or operating without meeting §112 requirements, or any combination thereof).

General Permits

The Title V regulations set out provisions for general permits covering numerous similar sources. The primary purpose of general permits is to provide a permitting alternative where

30

the normal permitting process would be overly burdensome, such as for area sources under section 112. General permits may be issued to cover any category of numerous similar sources, including major sources, provided that such sources meet certain criteria laid out in 40 CFR part 70. Sources may be issued general permits strictly for the purpose of avoiding classification as a major source. In other words, general permits may be used to limit the potential to emit for numerous similar sources. However, general permits must also meet both legal and practical federal enforceability requirements.

With respect to legal sufficiency, the operating permit regulations provide that once the general permit has been issued after opportunity for public participation and EPA and affected State review, the permitting authority may grant or deny a source's request to be covered by a general permit without further public participation or EPA or affected State review. The action of granting or denying the source's request is not subject to judicial review. A general permit does not carry a permit shield. A source may be subject to enforcement action for operating without a part 70 permit if the source is later determined not to qualify for coverage under the general permit. Sources covered by general permits must comply with all part 70 requirements.

State SIP or 112(l) General Permits

Another mechanism available to limit potential to emit is a general permit program approved into the SIP or under section 112(l), the hazardous air pollutant program authority. This mechanism allows permitting authorities to issue and revise general permits consistent with SIP or 112(l) program requirements without going through the SIP or 112(l) approval process for each general permit or revision of a general permit. The program is also separate from title V, like title I state operating permits, and issuance and revisions of the permits are not required to comply with title V procedures.

Once a program is approved, issuing and revising general permits should be significantly less burdensome and time-consuming for State legislative and rulemaking authorities. The EPA review should also be less burdensome and time-consuming. After a program is approved, permitting authorities have the flexibility to submit and issue general permits as needed rather than submitting them all at once as part of a SIP submittal. Given the reduced procedural burden, permitting authorities should be able to issue general permits to small groups or categories or sources rather than attempt to cover broad categories with a generic rule. We anticipate that specific permit requirements for general permits may be readily developed with the assistance of interested industry groups.

8/

The State general permit approach may allow sources to meet the federal enforceability requirements more easily than other approaches. However, to use this approach, States must have a federally enforceable program that provides the State the authority to issue such permits; to accomplish this, EPA must approve the program into the SIP or pursuant to section 112(l) of the Clean Air Act.

Enforceability Principles

In 1989, in response to challenges from the Chemical Manufacturers Association and other industry groups, EPA reiterated its position that controls and limitations used to limit a source's potential to emit must be federally enforceable. See 54 FR 27274 (June 28, 1989). Federally enforceable limits can be established by Clean Air Act programs such as NSPS, NESHAPs, MACTs, and SIP requirements. However, source-specific limits are generally set forth in permits. Generally, to be considered federally enforceable, the permitting program must be approved by EPA into the SIP and include provisions for public participation. In addition, permit terms and conditions must be practicably enforceable to be considered federally enforceable. EPA provided specific guidance on federally enforceable permit conditions in a June 13, 1989 policy memo "Limiting Potential to Emit in New Source Permitting" from John Seitz and in the June 28, 1989 Federal Register notice (54 FR 27274). Additional guidance can also be found in United States v. Louisiana Pacific, 682 F. Supp. 1122 (D. Colo. 1987), 682 F. Supp 1141 (D. Colo. 1988), which led to these guidance statements and a number of other memoranda covering practicable enforceability as it relates to rolling averages, short-term averages, and emission caps. See "Use of Long Term Rolling Averages to Limit Potential to Emit," from John B. Rasnic to David Kee, February 24, 1992; "Limiting Potential to Emit" from Mamie Miller to George Czerniak, August 5, 1992; "Policy Determination on Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project", from John B. Rasnic to David Kee, March 13, 1992; and "3M Tape Manufacturing Division Plant, St. Paul, Minnesota" from John B. Rasnic to David Kee, July 14, 1992.

In 1987, EPA laid out enforceability criteria that SIP rules must meet. See "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency" from Michael Alushin, Alan Eckert, and John Seitz, September 3, 1987 (1987 SIP memo). The criteria include clear statements as to applicability, specificity as to the standard that must be met, explicit statements of the compliance time frames (e.g. hourly, daily, monthly, or 12-month averages, etc.), that the time frame and method of compliance employed must be sufficient to protect the standard involved, recordkeeping requirements must be specified, and equivalency provisions must meet certain requirements.

Based on these precedents, this guidance describes six enforceability criteria which a rule or a general permit must meet to make limits enforceable as a practical matter. In general, practical enforceability for a source-specific permit term means that the provision must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, recordkeeping and reporting. For rules and general permits that apply to categories of sources, practical enforceability additionally requires that the provision (4) identify the categories of sources that are covered by the rule; (5) where coverage is optional, provide for notice to the permitting authority of the source's election to be covered by the rule; and (6) recognize the enforcement consequences relevant to the rule.

This guidance will address requirements (4) and (5) first as they are concepts that are unique to rules and general permits.

A. Specific Applicability

Rules and general permits designed to limit potential to emit must be specific as to the emission units or sources covered by the rule or permit. In other words, the rule or permit must clearly identify the category(ies) of sources that qualify for the rule's coverage. The rule must apply to categories of sources that are defined specifically or narrowly enough so that specific limits and compliance monitoring techniques can be identified and achieved by all sources in the categories defined.

A rule or general permit that covers a homogeneous group of sources should allow standards to be set that limit potential to emit and provide the specific monitoring requirements. (Monitoring is more fully addressed in section D.) The State can allow for generic control efficiencies where technically sound and appropriate, depending on the extent of the application and ability to monitor compliance with resultant emission limits. Similarly, specific and narrow applicability may allow generic limits on material usage or limits on hours of operation to be sufficient. For example, a rule or general permit that applies to fossil-fuel fired boilers of a certain size may allow for limits on material usage, such as fuel-type and quantity. A rule or general permit that applies only to standby diesel generators or emergency generators may allow restrictions on hours of operation to limit potential to emit. The necessary compliance terms (i.e., monitoring or recordkeeping) associated with any of these limits, such as with hours of operation, can readily be specified in the rule or the general permit itself.

General permits under Title V are assumed to include this

enforceability principle because the Part 70 regulations set out specific criteria that States should consider in developing their general permit provisions (See 57 FR 32278). These factors include requirements that

> "categories of sources covered by general permits should be generally homogenous in terms of operations, processes, and emissions. All sources in the category should have essentially similar operations or processes and emit pollutants with similar characteristics."

Another factor stated is "sources should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping." Examples of source categories appropriate for general permits include: degreasers, dry cleaners, small heating systems, sheet fed printers, and VOC storage tanks (see 57 FR 32278).

B. Reporting or Notice to Permitting Authority

The rule or general permit should provide specific reporting requirements as part of the compliance method. Although the compliance method for all sources must include recordkeeping requirements, the permitting authority may make a determination that reporting requirements for small sources would provide minimal additional compliance assurance. Where ongoing reporting requirements are determined not to be reasonable for a category of sources, the rule or general permit should still provide that the source notify the permitting authority of its coverage by the rule or the permit. In the limited situation where all the sources described in a source category are required to comply with the all of the provisions of a rule or general permit, notice is not needed. However, where there are no reporting requirements and no opt-in provisions, the permitting authority must provide the public with the names and locations of sources subject to the rule or permit.

For Title V general permits, Part 70 requires sources to submit an application for a general permit which must be approved or disapproved by the permitting authority. For SIP or §112 rules and SIP or §112 general permits, in response to receiving the notice or application, the permitting authority may issue an individual permit, or alternatively, a letter or certification. The permitting authority may also determine initially whether it will issue a response for each individual application or notice, and may initially specify a reasonable time period after which a source that has submitted an application or notice will be deemed to be authorized to operate under the general permit or SIP or §112 rule.

C. Specific Technically Accurate Limits

The rule or general permit issued pursuant to the SIP or §112 must specify technically accurate limits on the potential to emit. The rule or general permit must clearly specify the limits that apply, and include the specific associated compliance monitoring. (The compliance monitoring requirements are discussed further in the next section.) The standards or limits must be technically specific and accurate to limit potential to emit, identifying any allowed deviations.

The 1987 policy on SIP enforceability states that limitations "must be sufficiently specific so that a source is fairly on notice as to the standard it must meet." For example, "alternative equivalent technique" provisions should not be approved without clarification concerning the time period over which equivalency is measured as well as whether the equivalency applies on a per source or per line basis or is facility-wide.

Further, for potential to emit limitations, the standards set must be technically sufficient to provide assurance to EPA and the public that they actually represent a limitation on the potential to emit for the category of sources identified. Any presumption for control efficiency must be technically accurate and the rule must provide the specific parameters as enforceable limits to assure that the control efficiency will be met. For example, rules setting presumptive efficiencies for incineration controls applied to a specific or broad category must state the operating temperature limits or range, the air flow, or any other parameters that may affect the efficiency on which the presumptive efficiency is based. Similarly, material usage limits such as fuel limits, as stated above, require specifying the type of fuel and may require specifying other operating parameters.

A rule that allows sources to submit the specific parameters and associated limits to be monitored may not be enforceable because the rule itself does not set specific technical limits. The submission of these voluntarily accepted limits on parameters or monitoring requirements would need to be federally enforceable. Absent a source-specific permit and appropriate review and public participation of the limits, such a rule is not consistent with the EPA's enforceability principles.

D. Specific Compliance Monitoring

The rule must specify the methods to determine compliance. Specifically, the rule must state the monitoring requirements, recordkeeping requirements, reporting requirements, and test methods as appropriate for each potential to emit limitation; and clarify which methods are used for making a direct determination of compliance with the potential to emit limitations.

35

"Monitoring" refers to many different types of data collection, including continuous emission or opacity monitoring, and measurements of various parameters of process or control devices (e.g. temperature, pressure drop, fuel usage) and recordkeeping of parameters that have been limited, such as hours of operation, production levels, or raw material usage. Without a verifiable plantwide emission limit, verifiable emission limits must be assigned to each unit or group of units subject to the rule or general permit. Where monitoring cannot be used to determine emissions directly, limits on appropriate operating parameters must be established for the units or source, and monitoring must verify compliance with those limits. The monitoring must be sufficient to yield data from the relevant time period that is representative of the source's compliance with the standard or limit. Continuous emissions monitoring, especially in the case of smaller sources, is not required.

E. Practicably Enforceable Averaging Times

The averaging time for all limits must be practicably enforceable. In other words, the averaging time period must readily allow for determination of compliance. EPA policy expresses a preference toward short term limits, generally daily but not to exceed one month. However, EPA policy allows for rolling limits not to exceed 12 months or 365 days where the permitting authority finds that the limit provides an assurance that compliance can be readily determined and verified. See June 13, 1989 "Guidance on Limiting Potential to Emit," February 24, 1992 Memorandum "Use of Long Term Rolling Averages to Limit Potential to Emit" from John Rasnic to David Kee, and March 13, 1992 "Policy Determination on Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project" from John B. Rasnic to David Kee, stating that determinations to allow an annual rolling average versus a shorter term limit must be made on a case by case basis. Various factors weigh in favor of allowing a long term rolling average, such as historically unpredictable variations in emissions. Other factors may weigh in favor of a shorter term limit, such as the inability to set interim limits during the first year. The permitting agency must make a determination as to what monitoring and averaging period is warranted for the particular source-category in light of how close the allowable emissions would be to the applicability threshold.

F. Clearly Recognized Enforcement

Violations of limits imposed by the rule or general permit that limit potential to emit constitute violations of major source requirements. In other words, the source would be violating a "synthetic minor" requirement which may result in the source being treated as a major source under Titles I and V. The 1989 Federal Register Notice provides for separate enforcement

36

and permitting treatment depending on whether the source subsequently chooses to become major or remain minor. Thus, violations of the rule or general permit or violation of the specific conditions of the rule or general permit subjects the source to potential enforcement under the Clean Air Act and state law. The operating permit rule states that notwithstanding the shield provisions of part 70, the source subject to a general permit may be subject to enforcement action for operating without a part 70 permit if the source is later determined not to qualify for the conditions and terms of the general permit. Moreover, violation of any of the conditions of the rule or general permit may result in a different determination of the source's potential to emit and thus may subject the source to major source requirements and to enforcement action for failure to comply with major source requirements from the initial determination.

Rule Requirements for State General Permit Programs

As discussed above, general permit programs must be submitted to EPA for approval under SIP authority or under section 112(l), or both, depending on its particular pollutant application. SIP and 112(l) approval and rulemaking procedures must be met, including public notice and comment. The specific application of the enforceability principles for establishing State SIP or §112(l) general permit programs require that the rule establishing the program set out these principles as rule requirements. In other words, these principles must be specific rule requirements to be met by each general permit.

The rule establishing the program must require that (1) general permits apply to a specific and narrow category of sources; (2) sources electing coverage under general permits, where coverage is not mandatory, provide notice or reporting to the permitting authority; (3) general permits provide specific and technically accurate (verifiable) limits that restrict the potential to emit; (4) general permits contain specific compliance monitoring requirements; (5) limits in general permits are established based on practicably enforceable averaging times; and (6) violations of the permit are considered violations of the State and federal requirements and may result in the source being subject to major source requirements.

In addition, since the rule establishing the program does not provide the specific standards to be met by the source, each general permit, but not each application under each general permit, must be issued pursuant to public and EPA notice and comment. The 1989 Federal Register notice covering enforceability of operating permits requires that SIP operating permit programs issue permits pursuant to public and EPA notice and comment. Title V requires that permits, including general permits, be issued subject to EPA objection.

Finally, sources remain liable for compliance with major source requirements if the specific application of a general permit to the source does not limit the source's potential to emit below major source or major modification thresholds. (The limits provided in these mechanisms may actually limit the potential to emit of sources but may not limit the potential to emit for some sources to below the threshold necessary to avoid major source requirements. For example, a general permit for industrial boilers may in fact provide limits that are sufficient to bring a source with only two or three boilers to below the subject thresholds, but a source with more than three boilers may have a limited PTE but not limited below the major source threshold.) Also, where the source is required to use another mechanism to limit potential to emit, i.e., a construction permit, the general permit may not be relied upon by the source or the State to limit potential to emit.

Permits issued pursuant to the approved program, meeting the above requirements, are adequate to provide federally enforceable limits on potential to emit for New Source Review, title V, and section 112 programs as long as they are approved pursuant to SIP (section 110) and section 112(l) authorities.

undertaken without a permit granted by the Agency or in violation of any condition imposed by such permit. Any denial of such a permit or any conditions imposed in such a permit shall be reviewable by the Board in accordance with section 40 of the Act."

Section 9.1 d.2 thus requires that State permits comply with the provisions of the CAA and federal regulations adopted pursuant to the CAA. To issue a permit with a limit less stringent than federal requirements or a State SIP rule is not allowed by the State Act. Permits reviewable by the IPCB in accordance with section 40 can only have their limits changed if the IPCB finds that IEPA has made an error. Section 40 does not have provisions which allow altering emission limits other than to correct clerical error by the IEPA. There is no authority in section 40 of the State Act to grant a waiver from a permit limit. Based on these provisions, USEPA has determined that the State authority to grant permits is properly restrained by the terms of the SIP, as required by the third criteria.

Fourth Criterion

"The limitations, controls, and requirements in the operating permits are permanent, quantifiable and otherwise enforceable as a practical matter."

USEPA has reviewed the Illinois operating permit program and is satisfied that it requires the state to issue permits which meet the requirements of this provision. While the permits do expire the conditions they impose must be complied with during the entire term of the permit as well as during the transition to a renewal permit. Section 9.1(f) of the State Act states that, "if a complete application for a permit renewal is submitted to the Agency at least 90 days prior to expiration of the permit, all of the terms and conditions of the permit shall remain in effect until final administrative action has been taken on the application." This provision of the State Act uses language similar to the federally proposed title V operating permit rules which are intended to provide permanency to the limits in title V permits, which have expiration dates. This approach to making permit limits permanent is thus approvable by USEPA.

Illinois' permit conditions are characteristically written so that they are quantifiable and enforceable as a practical matter. Limits and averaging times are consistent with test methods and procedures. If USEPA in the future determines that an individual permit condition is not quantifiable or practically enforceable, it can deem the permit not "federally enforceable" within the means of the NSR regulations. The State's current practice and regulatory provisions meet the fourth criterion for permit program approval.

Fifth Criterion

"The permits are issued subject to public participation." This means that the State agrees, as part of its program to provide USEPA and the public with timely notice of the proposal and issuance of such permits, and to provide USEPA, on a timely basis, with a copy of each proposed (or draft) and final permit intended to be federally enforceable. This process might also provide for an opportunity for public comment on the permit application prior to the issuance of the final permit.

On September 25, 1985, USEPA approved Illinois' rules governing public participation in the air permit program for major sources in nonattainment areas. These rules provide for public notification prior to permit issuance and an opportunity for public comment.

The public comment procedure and commitments to follow them in issuing operating permits which were submitted by IEPA, are approvable as meeting the [illegible].

In the preamble to the regulations that USEPA promulgated on June 28, 1989 (54 FR 27274), which set forth the five criteria outlined above for a federally enforceable operating permit program, USEPA indicated that it would "consult with States on methods by which existing operating permits could be made federally enforceable under a subsequently approved State operating program." (54 FR 27284). The preamble then went on to suggest two possible means of securing USEPA approval of previously issued permits—either submitting the permits in bulk to USEPA as a SIP revision or reissuing existing permits on a source by source basis. *Id.* These two options were not intended to be a complete list of alternatives. Rather they were suggested as two possible ways by which a state could make previously issued operating permits federally enforceable. Because both options could require the State to spend considerable resources in reprocessing otherwise valid operating permits, the USEPA has evaluated additional approaches. The USEPA today finds the existing Illinois SIP regulations to be consistent with federal requirements. If the State followed its own procedures, each permit issued under this regulation was subject to public notice and comment and prior USEPA review. Therefore, USEPA will consider all operating permits issued which were processed in a manner consistent with both the State regulations and the five criteria to be federally enforceable with the promulgation of this rule provided that any permits that the State wishes to make federally enforceable are submitted to USEPA and accompanied by documentation that the procedures approved today have been followed. USEPA will expeditiously review any individual permits so submitted to ensure their conformity to the program requirements.

[illegible] approval of the State's operating permit program for the purpose of issuing federally enforceable operating permits is intended as a mechanism for making the operating permits used to implement the requirements of the Act, including section 110 and part D of title I federally enforceable. After the effective date of this rule, operating permits issued by Illinois in conformance with the five criteria listed above will be considered federally enforceable. Additionally, operating permits issued subsequent to the incorporation of the Illinois operating permit program into the SIP but before the effective date of this rule will also be considered federally enforceable if the State submits them to USEPA along with documentation that they were issued in conformance with the five criteria listed above.

Prior to the 1990 Amendments of the Act, there was no express federal requirement for a SIP to include an operating permit program. Only a construction permit program was directly required. However, Illinois and many other states voluntarily included an operating permit program in their SIPs to assist them in regulating emission sources. The Illinois operating permit program covers all emission sources regardless of the source's potential to emit. In contrast, all states are required by title V of the Act Amendments of 1990 to adopt and submit to USEPA an operating permit program by November 15, 1993, regulating the following: Major sources, sources subject to a hazardous air pollutant standard under section 112 of the Act, sources subject to new source performance standards under section 111 of the Act, sources affected under the acid rain provisions of title V of the Act, sources required to have a preconstruction review permit pursuant to the prevention of significant deterioration (PSD) or NSR program under title I of the Act. In addition, USEPA may add or exempt from the title V permitting program any other

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

JUL 1 0 1995

MEMORANDUM

SUBJECT: White Paper for Streamlined Development of Part 70 Permit Applications

FROM: Lydia N. Wegman, Deputy Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides and Toxics Management Division, Regions I and IV
Director, Air and Waste Management Division, Region II
Director, Air, Radiation and Toxics Division, Region III
Director, Air and Radiation Division, Region V
Director, Air, Pesticides and Toxics Division, Region VI
Director, Air and Toxics Division, Regions VII, VIII, IX, and X

Please find attached a White Paper on Part 70 permit applications. The paper is designed to streamline and simplify the development of part 70 permit applications. The guidance was developed to respond to the concerns of industry and permitting authorities that preparation of initial permit applications was proving more costly and burdensome than necessary to achieve the goals of the Title V permit program.

The White Paper provides several streamlining improvements. Among them, it allows industry to:

- Provide emissions descriptions, and not emissions estimates, for emissions not regulated at the source, unless such estimates are needed for other purposes, such as calculating permit fees;

- Submit checklists, rather than emission descriptions, for insignificant activities based on size/production rate and for risk management plans potentially owed under section 112(r);

- Provide citations for applicable requirements, with qualitative descriptions for each emissions unit, and

40

for prior new source review (NSR) permits;

- Exclude certain trivial and short-term activities from permit applications;

- Provide group treatment for activities subject to certain generally-applicable requirements;

- Certify compliance status without requiring re-consideration of previous applicability decisions;

- Use the Part 70 permit process to identify environmentally significant terms of NSR permits, which should be incorporated into the part 70 permit as federally-enforceable terms; and

- Submit tons per year estimates only where meaningful to do so and not, for example, for section 112(r)-only pollutants; such estimates should be based on generally-available information rather than new studies or testing.

There is an immediate need for the implementation of this guidance. Increasing numbers of sources are becoming subject to the requirement to file a complete part 70 application as more State part 70 programs are approved. I strongly encourage you to work with your States to effect near-term use of the White Paper guidance to streamline the application process.

I want to thank you and your staff for your support in developing this guidance and invite your suggestions on what additional guidance is needed to improve further the initial implementation of title V. If you should have any questions regarding the attached guidance, please contact Michael Trutna at (919) 541-5345 or Jeff Herring at (919) 541-3195.

Attachment

cc: M. Trutna (MD-12)
J. Herring (MD-12)
A. Eckert (2344)
J. Domike (2242A)
A. Schwartz (2344)

WHITE PAPER FOR

STREAMLINED DEVELOPMENT OF PART 70 PERMIT APPLICATIONS

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF AIR QUALITY PLANNING AND STANDARDS

July 10, 1995

Contacts: Michael Trutna (919) 541-5345
Jeff Herring (919) 541-3195

42

EPA WHITE PAPER FOR

STREAMLINED DEVELOPMENT OF PART 70 PERMIT APPLICATIONS

July 10, 1995

I. INTRODUCTION

The EPA is issuing this guidance to enable States to take immediate steps to reduce the costs of preparing and reviewing initial part 70 permit applications. A perceived lack of clarity in these requirements has led to an unintended escalation in permit application costs. Too often, sources have felt compelled to make conservative assumptions to assure themselves of receiving the "application shield" and avoiding enforcement actions.

Title V of the Clean Air Act (the Act) and its implementing regulations in part 70 set forth minimum requirements for State operating permit programs. In general, this program was not intended by Congress to be the source of new substantive requirements. Rather, operating permits required by title V are meant to accomplish the largely procedural task of identifying and recording existing substantive requirements applicable to regulated sources and to assure compliance with these existing requirements. Accordingly, operating permits and their accompanying applications should be vehicles for defining existing compliance obligations rather than for imposing new requirements or accomplishing other objectives.

There is an immediate need for this guidance. Most States and those local air pollution control agencies participating in the program (hereinafter referred to as "States") are expected to receive approval by the fall of 1995 of their part 70 operating permit programs to implement title V of the Act. As a result, most sources are in the process of preparing their initial applications, a number of sources have already submitted their initial applications, and a few part 70 permits have already been issued. As programs start to be implemented, concerns are being raised by States and sources as to the expectations for complete permit applications and permit content, the intended scope of the program, and the respective responsibilities of sources, permitting authorities, and the Environmental Protection Agency (EPA) in making implementation decisions in accomplishing permit issuance.

The EPA recognizes that the burden for filing a complete application may vary significantly among States as does the nature of their applicable requirements, status of source compliance, air quality conditions, the type of permit fee schedule, and the size and complexity of their industry. However, EPA believes that the mentioned problems, if unaddressed, would threaten implementation of the title V

program, and thus warrant a timely response. The clarifications contained in this policy statement are made under the current part 70 regulations and should typically not require State rulemaking. The EPA strongly urges States to allow sources to take near term advantage of the flexibility provided by this paper, particularly during the initial implementation phase of the program. It is imperative that the provisions and clarifications of this paper are implemented by States as quickly as possible. Most States need not wait for EPA approval before implementing this guidance, however they are encouraged to consult with the appropriate EPA Regional Office as they adjust implementation of their programs.

Section II of this paper articulates how part 70 allows permitting authorities considerable flexibility to make decisions regarding the completeness of applications and their adequacy to support initial permit issuance. This guidance makes clear that the part 70 rules do not impose unreasonable permit application preparation burdens. In particular, it accomplishes application streamlining by enabling and encouraging the use of:

- Tons per year (tpy) estimates for emissions units and pollutant combinations subject to applicable requirements, and only where meaningful to do so (e.g., not for section 112(r)-only pollutants); such estimates can be based on generally-available information rather than new studies or testing;

- Emissions descriptions, not estimates, for emissions not regulated at the source (unless needed for permit fee calculation, for purposes of establishing a permit shield or a plantwide applicability limit (PAL), or for resolution of applicable requirement coverage or major source status);

- Checklists rather than emission descriptions for insignificant activities based on size/production rate and risk management plans potentially owed under section 112(r);

- Exclusions for certain trivial and short-term activities from permit applications (see Attachment A);

- Group treatment for activities subject to certain generally-applicable requirements;

- Part 70 permit process to reconcile which terms of existing new source review (NSR) permits should be incorporated into the part 70 permit as federally-enforceable terms;

- Citations for applicable requirements with qualitative

44
E

descriptions for each emissions unit, and for prior NSR permits as they may be revised; and

- Certifications of compliance status which do not require re-evaluation of previous applicability decisions.

This paper affirms EPA's strong commitment to successful program implementation. It is the first in a series of policy statements intended to alleviate known implementation concerns within the framework of the existing part 70 regulations. At the same time, the Agency is developing rulemaking which will afford a new streamlined approach to part 70 permit revisions and provide other relief not possible under the current rule. The policies set out in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

II. STREAMLINED DEVELOPMENT OF COMPLETE Part 70 APPLICATIONS

A. Current Requirements for Complete Applications (§ 70.5)

Within 12 months of the effective date of a part 70 program, all sources subject to the program must submit complete permit applications. The State may establish, and many have established, a phased schedule for application submittals.

Section 70.5(c)(3) requires a permit application to describe all emissions of pollutants for which a source is major and all emissions of regulated air pollutants. It also authorizes the permitting authority to obtain additional information as needed to verify which requirements are applicable to the source. Applications are also sometimes relied upon to evaluate the fee amount required under the approved permit fee schedule. Emissions information for these purposes does not always need to be detailed or precise. Information for applicability purposes need only be detailed enough to resolve any open questions about which requirements apply. Information for fee purposes only has to be consistent with what is required in applications by the permitting authority to implement its fee schedule. No information is needed when this activity is done outside the part 70 permit application process. Finally, in cases where the applicable requirement will be established or defined in the part 70 permit (e.g., PAL), the part 70 permit application must contain additional information as needed to verify emissions levels and the basis for measuring changes from them.

Section 70.5(c) further requires the application to contain a compliance plan describing the compliance status of the source with respect to all applicable requirements. For sources that will not be in compliance at the time of permit issuance, the application must contain a narrative description of how the

source will achieve compliance and a detailed schedule of remedial measures leading to compliance. If the source is in compliance, the application need only contain a statement that the source will continue to comply. For applicable requirements that will take effect during the permit term, the compliance plan may be a statement that the source will meet them. Each application must also include a certification of the source's compliance status with respect to each applicable requirement and a statement of the methods used for determining compliance. Finally, the responsible official must also certify that the application form and the compliance certification are true, accurate, and complete based on information and belief formed after reasonable inquiry.

Each part 70 program must contain criteria and streamlined procedures for determining when permit applications are complete. Applications for an initial part 70 permit may be considered complete if they have information sufficient to allow the permitting authority to begin processing the application. Unless the permitting authority determines that an application is not complete within 60 days, it will be considered complete by default. If the source submits a timely and complete application the source is shielded against penalties for operating without a permit until its part 70 permit is issued (i.e., the source is granted the "application shield").

Even after applications have been initially determined to be complete, the source must submit any additional information requested by the permitting authority to determine, or evaluate compliance with applicable requirements, within the reasonable timeframe allowed by the permitting authority, to maintain the effect of the application shield. In addition, until release of the draft permit, sources have an on-going responsibility to correct information or submit supplemental information needed to prepare the permit. The timeframe for updates will depend on the permitting authority's schedule for performing the technical review for a given application. The application shield once granted remains in effect until permit issuance even where the source augments its original application submittal in response to requests for more information by the permitting authority.

As mentioned, considerable confusion exists as to what constitutes a complete application under the requirements of part 70. Due to the significant new penalties for knowing violations and the extremely visible forum for processing permit applications, in the absence of clear guidance many sources have made or are making very conservative assumptions regarding their obligations. For example, many in the regulated community feel that a part 70 application can be complete only if it exhaustively catalogues every past and present emitting activity with great precision. Others fear that an application can never be complete since many Act requirements are still evolving,

confusion exists as to which requirements are applicable to the source (e.g., what constitutes the State Implementation Plan (SIP)), or no monitoring data exists upon which to base the initial certification of compliance. Other concerns have been raised regarding the choice of emissions estimation techniques and the amount of information needed to support decisions of applicability or exemption, especially those involving the appropriate NSR for previous construction activities.

There is also a general apprehension that EPA will second guess any or all of these judgments during its review period and thereby impede the permit issuance process. Others are concerned that even if complete applications could be filed, they soon would grow obsolete and require updates before a draft permit could be prepared. In addition, there are concerns that EPA will issue guidance in the future which would establish extensive new requirements concerning the content of a complete application. As a result, worst-case assumptions for various determinations are being made effecting a level of rigidity and rigor as well as cost unintended by the current regulations.

This guidance is intended to correct these misunderstandings. It is intended to give States and sources direction on how States can reduce these burdens while achieving the requirements of title V. As previously stated, EPA believes that these streamlining ideas can and should be implemented under the current part 70 rule for most States. To the extent State forms reflect the current confusion, the Agency wishes to clarify the issues sufficiently for States to revise the portion of their forms implementing title V to be consistent with this guidance.

B. Content of Part 70 Permit Applications

1. Overview

This section describes the level of information which must be contained in a part 70 permit application for it to be considered complete. This guidance clarifies the minimum requirements under the Federal regulations for acceptable part 70 permit applications. It grants a substantial degree of discretion to State permitting agencies. The EPA recognizes that different States may adopt different approaches to these minimum requirements depending on their local needs and circumstances, and that others may elect to go beyond those minimum requirements. However, at least in the initial program phase, EPA urges States to keep part 70 application requirements to the minimum needed to identify applicable requirements. In many instances, a qualitative description of emissions, or sometimes no description at all, will satisfy this standard.

This section specifically clarifies that there are different expectations for information from emissions units depending on

whether and how applicable requirements apply. In addition, this section provides several policy clarifications aimed at lowering current application burdens associated with addressing insignificant activities, generic grouping of emissions units and activities, short-term activities, incorporation of current NSR permit conditions, section 112(r) requirements, and Research and Development (R&D) activities.

2. Required Emissions Information And Source Descriptions

Applications should contain information to the extent needed to determine major source status, to verify the applicability of part 70 or applicable requirements, to verify compliance with applicable requirements, and to compute a permit fee (as necessary). Section 70.5(c) requires the application to describe emissions of all regulated air pollutants for each emissions unit. This would require at least a qualitative description of all significant[1] emissions units, including those not regulated by applicable requirements.

While part 70 does not require detailed emissions inventory building, it does require limited emissions-related information for each pollutant and emissions unit combination which is regulated at the source. Section 70.5(c)(3)(iii) requires for such units emissions rate descriptions in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method. The EPA interprets the tpy estimates to not be required at all where they would serve no useful purpose, where a quantifiable emissions rate is not applicable (e.g., section 112(r) requirements or a work practice standard), or where emissions units are subject to a generic requirement (see Section 4. Generic Grouping of Emissions Units and Activities).

On the other hand, more emissions information would presumptively be required to verify emissions levels and monitoring approaches where PALs or other plantwide emissions limits would be established or defined in part 70 permits. Another situation where additional emissions information might be needed is where the permitting authority would be granting the shield relative to a decision of non-applicability where a source is claiming an exemption based on an emissions level cutoff in a standard that has been issued for the category to which the emissions unit potentially belongs. In such cases additional information to support a determination that a requirement is not applicable may well be required. In addition, for the minority

---

[1]The term "significant" as used in this policy statement does not have the meaning as used in § 52.21 (e.g., 15 tpy PM-10, 40 tpy VOC) but rather means that the emissions unit does not qualify for treatment in the application as an insignificant emissions unit.

of States that use the part 70 application to determine the first year's permit fee, the application and its description of all regulated air pollutants for presumptive fee calculation must also be adequate for that purpose. Finally, additional emissions information might also be necessary in some cases to resolve a dispute over whether a particular requirement is applicable, or whether a source is major for a particular pollutant (additional information would not be necessary where a source would stipulate to the applicablity of the requirement and/or its major status).

Wherever emissions estimates are needed (unless the source independently decides to more accurately estimate emissions), use of available information should suffice. Any information that is sufficient to support a reasonable belief as to compliance or the applicability or non-applicability of requirements will be acceptable for these purposes. That could include AP-42 emission factors, emissions factors in other EPA documents, or reasonable engineering projections, as well as test data (see Section C. Quality of Required Information).

Any required tpy estimates are not to be included as federally-enforceable part 70 permit terms, unless otherwise required by an applicable requirement or requested by the source to avoid one. In addition, where tpy descriptions are needed, EPA does not believe that part 70 requires multiple forms of emissions estimates (i.e., actual allowable, and potential emissions). Also, where an emissions estimate is needed for part 70 purposes but is otherwise available (e.g., recent submittal of emissions inventory), then the permitting authority can allow the source to cross-reference this information for part 70 purposes.

Even if tpy estimates are not necessary, part 70 applications must describe all significant emissions units, including any which are not subject to any applicable requirement at any given emissions unit. Such unregulated emissions can include hazardous air pollutants (HAP) listed under section 112(b) of the Act and criteria pollutants that are unregulated for a particular emissions unit. A general description of emissions (i.e., simple identification of the significant pollutant or family of pollutants believed to be emitted by the emissions unit) should suffice. For part 70 purposes, the descriptions of emissions units themselves also can be quite general (i.e., descriptions need not contain information such as UTM coordinates or model and serial numbers for equipment, unless such information is needed to determine the applicability of, or to implement, an applicable requirement). Negative declarations are not required for pollutants that are not emitted by the emissions unit.

Some examples may help to illustrate where only source descriptions of regulated and unregulated emissions are necessary

for title V purposes:

- An application for a de-greaser subject to a requirement to have a certain type of lid could describe the relevant applicable requirement and simply identify that it emits volatile organic compounds (VOC) and falls within the scope of the regulation. Quantification of the VOC emissions would not be necessary since the level of emissions is not relevant to the standard.

- An application for a storage tank subject to a requirement to have a certain type of seal, in addition to describing this requirement, would only need to generally identify the types of pollutants emitted, such as VOC and HAP generally.

- An application for a boiler that is grandfathered under the SIP could just identify that PM, SO2, NOx, VOC, lead, and HAP are emitted and that no applicable requirement is relevant.

3. Insignificant Activities

Section 70.5(c) allows the Administrator to approve as part of a State program a list of insignificant activities which need not be included in permit applications. For activities on the list, applicants may exclude from part 70 permit applications information that is not needed to determine (1) which applicable requirements apply, (2) whether the source is in compliance with applicable requirements, or (3) whether the source is major. If insignificant activities are excluded because they fall below a certain size or production rate, the application must describe any such activities at the source which are included on the list. Even for such insignificant activities, the process for listing them in the application can be fairly simple. The permitting authority could allow the source merely to list in the application the kinds of insignificant activities that are present at the source or check them off from a list of insignificant activities approved in the program.

In addition to the insignificant activity provisions of § 70.5(c), there is flexibility inherent in § 70.5 to tailor the level of information required in the application to be commensurate with the need to determine applicable requirements. The EPA believes this inherent flexibility encompasses the idea that certain activities are clearly trivial (i.e., emissions units and activities without specific applicable requirements and with extremely small emissions) and can be omitted from the application even if they are not included on a list of insignificant activities approved in a State's part 70 program pursuant to § 70.5(c). Attachment A lists examples of activities

50

which EPA believes should normally qualify as trivial in this sense. This list is intended only as a starting point for States to consider. The determination of whether any particular item should be on the State's trivial list may depend on State-specific factors (e.g., whether the activity is subject to the requirements of the SIP). Permitting authorities can also allow, on a case-by-case basis without EPA approval, exemptions similar to those activities identified in Attachment A. Additional exemptions, to the extent that the activities they cover are not clearly trivial, still need to be approved by EPA before being added to State lists of insignificant activities.

4. Generic Grouping of Emissions Units and Activities

Questions have arisen regarding whether emissions units and activities may be treated generically in the application and permit for certain broadly applicable requirements often found in the SIP. Examples of such requirements brought to EPA's attention include requirements that apply identically to all emissions units at a facility (e.g., source-wide opacity limits), general housekeeping requirements, and requirements that apply identical emissions limits to small units (e.g., process weight requirements). These requirements are sometimes referred to as "generic," because they apply and are enforced in the same manner for all subject units or activities.

These requirements can normally be adequately addressed in the permit application with minimal or no reference to any specific emissions unit or activity, provided that the scope of the requirement and the manner of its enforcement are clear. Even where such generic requirements attach to individual small emissions units or activities, requiring a unit-by-unit or activity-by-activity description of numerous units or activities would generally impose a paperwork burden that would not be compensated by any gain in the practical enforceability of such relatively simple requirements. Therefore, provided the applicant documents the applicability of these requirements and describes the compliance status as required by § 70.5(c), the individual emissions units or activities may be excluded from the application, provided no other requirement applies which would mandate a different result. Similarly, the part 70 permit which must assure compliance with the generic applicable requirement would be written without specificity to applicable emissions units or activities.

In EPA's view, the validity of this approach stems from the nature of these applicable requirements. Accordingly, EPA believes application of this principle for grouping subject activities together generically should not depend on whether those activities qualify as trivial or insignificant. Where the applicable requirement is amenable to this approach, that is, where (1) the class of activities or emissions units subject to

the requirement can be unambiguously defined in a generic manner and where (2) effective enforceability of that requirement does not require a specific listing of subject units or activities, permitting authorities may follow this approach regardless of whether subject activities have been listed as trivial or insignificant.

A lengthy list of the types of requirements suitable for this treatment is not possible here because, among other reasons, the examples of which EPA is aware are SIP requirements, and so vary from State to State. Permitting authorities are in the best position to decide which SIP requirements can be treated in this generic fashion. However, permitting authorities may wish to consult with the EPA Regional office in advance to clarify any uncertainties.

5. Short-term Activities

States can treat many short-term activities (e.g., activities occurring infrequently and for a short duration at a part 70 source) subject to an applicable requirement in the same fashion as activities subject to a generic requirement (see previous discussion). Since these activities are not present at the source during preparation of the permit, the most that can be expected is generic treatment in the application. For such activities, the application and permit would not include emissions unit specificity but instead would contain a general duty to meet all applicable requirements that would apply to any qualifying short-term activity. Short-term activities which are not subject to an applicable requirement should be classified as insignificant activities or would qualify as trivial, and so would not be included in either the part 70 application or permit.

For example, a contractor-run sandblasting operation that is subject to a SIP limit for particulate matter might be operated on an infrequent but recurring basis might qualify for the general duty approach. However, where such activities re-occur with considerable frequency, the permitting authority could require them to be included in the permit. The source would also be obligated to revise the permit if operation of any short-term activity would be in conflict with the permit. If short-term construction activities occur, the part 70 permit application would need to address them only if they are subject to the State's NSR program or are otherwise in conflict with the envisioned part 70 permit.

6. Determination of Applicable SIP Requirements

One of the undisputed challenges facing both State and the regulated community in their efforts to develop complete applications is the determination of the applicable SIP

requirements for a part 70 source. In some situations, it may be difficult to identify all the requirements in the SIP which are applicable to a particular source. Applicants, after consultation with the permitting authority, should include in permit applications the State rules which, to the best of their knowledge, are in the SIP. A good faith estimate will be enough to support both a valid compliance certification and a "completeness" determination. Review by the permitting authority, EPA, and the public may provide additional insight into whether any other applicable requirements exist. Any additions should not affect the validity of the original permit application and its eligibility for the application shield or of the accompanying compliance certification. However, the source would have to update its certification to account for any subsequently identified SIP requirements.

At least one State has developed a checklist of its air rules and required the applicant to check off which ones apply and select appropriate codes for rationalizing which ones do not apply. This type of approach should aid the source in providing in the part 70 application its understanding of what applicable requirements apply. Sources in such a State may rely on the checklist. The EPA has also provided a contractor to document the approved SIP for each State. Where an EPA compilation exists, sources may rely on it as well. This process is well underway for most States and permitting authorities and, in many cases, EPA Regional Offices can provide the rule citation of the State rules that have been approved as part of the SIP.

Where a State has adopted a rule that is pending approval by EPA into the SIP, sources (if advised by the permitting authority) could in their applications note that the corresponding State-only requirements will become federally enforceable upon SIP approval. The permitting authority during review of the application would be responsible for determining if the SIP had been approved. If so, then the permitting authority would incorporate the requirements into the federally-enforceable portion of the permit. If the requirements had not been approved into the SIP, the permitting authority could incorporate the pending requirements into the State-only enforceable portion of the permit and note that the requirements would become federally enforceable upon SIP approval. The federally-enforceable portion of the permit would include the existing SIP requirements and condition them to expire upon EPA approval of the SIP revision. Once the SIP revision is approved, the pending permit terms would become federally-enforceable and the permit terms based on the superseded SIP rule would become void.

7. <u>Incorporation of Prior NSR Permit Terms and Conditions</u>

This paper provides guidance to States and sources in devising a means to revise NSR permit terms as appropriate

(including classification as a State-only enforceable term) in conjunction with the part 70 permit issuance process. As used here, "new source review" refers to all forms of preconstruction permitting under programs approved into the SIP, including minor and major NSR (e.g., prevention of significant deterioration). Section 70.2 defines any term or condition of a NSR permit issued under a Federal or SIP-approved NSR program as being an applicable requirement. The Agency has concluded, however, that only environmentally significant terms need to be included in part 70 permits. The EPA recognizes that NSR permits contain terms that are obsolete, extraneous, environmentally insignificant, or otherwise not required as part of the SIP or a federally-enforceable NSR program. Such terms, as subsequently explained, need not be incorporated into the part 70 permit to fulfill the purposes of the NSR and title V programs required under the Act.

Minor NSR, in particular, is a program which the State has discretion to mold as necessary to be consistent with the goals of the SIP. Therefore, the permitting authority has very broad discretion in determining the terms of minor NSR. This discretion also exists to a much lesser extent in crafting major NSR permits, since the Act and EPA regulations contain several express requirements for review of major subject sources. Many NSR permit terms written in the past for both minor and major NSR, however, were understandably not written with a view toward careful segregation of terms implementing the Act from State-only requirements.

The EPA believes that the part 70 permit issuance process, involving as it does review by the permitting authority, public, and EPA, presents an excellent opportunity for the permitting authority to make appropriate revisions to a NSR permit[2] contemporaneously with the issuance of the part 70 permit. The public participation procedures for issuance of a part 70 permit satisfy any procedural requirements of Federal law associated with any NSR permit revision. This parallel processing approach is also an excellent opportunity to minimize the administrative burden associated with such an exercise. By conducting a simultaneous revision to the NSR permit, the permitting authority would be revising the "applicable NSR requirement" for purposes of determining what must be included in the part 70 permit.

There are several factors which bound the available discretion of the permitting authority in deciding whether an

---

[2]In many States, an NSR permit is subsequently converted to an operating permit leaving the preconstruction permit void. In other States, there is not a separate construction permit (i.e., single permit system). In either case the phrase "NSR permit" means the current permit in which the NSR applicable requirements reside.

54
15

NSR permit term is necessary and must be incorporated into the part 70 permit as a federally-enforceable condition. Certainly all NSR terms must be incorporated which are mandatory under EPA's governing regulations (e.g., best available control technology, lowest achievable emissions rate, and other applicable NSR emission limits), or are not mandatory under EPA regulations but are expressly required under the terms of the State's NSR program (e.g., new source performance standards (NSPS) and SIP emission limits, reporting and recordkeeping requirements[3]), or are voluntarily taken by the source to avoid an otherwise applicable requirement (e.g., emission limits used to create a "synthetic minor" source, to "net out" of major NSR, or to create tradeable offsets or other emission reduction credits).

On the other hand, other NSR permit terms and conditions may be patently obsolete and no longer relevant to the operation of the source, such as terms regulating construction activity during the building or modification of the source, where the construction is long completed and the statute of limitations on construction-phase activities has run out. These terms no longer serve a Federal purpose and need not be included as terms of the part 70 permit. Likewise, the State will also need to identify provisions from NSR permits that are not required under Federal law because they are unrelated to the purposes of the NSR program. Examples typically include odor limitations, and limitations on emissions of hazardous air pollutants where such limitations do not reflect a section 112 standard or a SIP criteria pollutant requirement. Where the State retains such conditions, it would draft the part 70 permit to specify that they are State-only conditions and incorporate them into the part 70 permit as such.

New source review permits are also likely to contain other terms that are not patently obsolete or irrelevant, but that the source and permitting authority agree are nevertheless extraneous, out-dated, or otherwise environmentally insignificant and inappropriate for inclusion in a federally-enforceable permit. Candidates for this exclusion include: (1) information incorporated by reference from an application for a preconstruction permit (to the extent this information is needed to enforce NSR permit terms it should be converted to terms in the part 70 permit), or (2) original terms of a preconstruction permit that has been superseded by other terms related to operation. The propriety of excluding other types of NSR permit

---

[3]This does not preclude the possibility that certain federally-enforceable limits incorporated into the NSR permit may qualify for generic treatment in the application and the permit as described in Section 4. Generic Grouping of Emissions Units and Activities.

55
16

terms will need to be evaluated on a case-by-case basis.

The EPA believes that the above parallel processing approach should be effective in most situations to incorporate the federally significant NSR permit terms into the part 70 permit in an efficient and workable way. However, the Agency recognizes that sources and permitting authorities may experience serious burden and timing concerns in accomplishing this process. Therefore, the Agency recommends the following approach, which EPA believes is consistent with the current part 70 rule. Under this approach, sources may in their part 70 permit applications, propose candidate terms from their current NSR permits which they reasonably believe should be considered for revision, deletion, or designation as being enforceable only by the State. Upon submittal of the application, the source would, as a Federal matter, only need to certify compliance status for those remaining NSR terms that it had earmarked for incorporation into the part 70 permit as federally-enforceable terms. The permitting authority, as part of the collaborative part 70 permit issuance process, would review the list of terms recommended in good faith by the source for deletion, revision, or State-only status and would ultimately agree or disagree with the source's proposal. Where the permitting authority decided that terms beyond those proposed as federally enforceable by the source should be retained to implement NSR, the source would be required to re-certify its application with respect to those NSR terms. Failure to do so within the timeframe required by the permitting authority would result in an inaccurate certification and the loss of the application shield.

The resolution of which NSR terms are to be incorporated should ideally be completed by the time of initial part 70 permit issuance. However, the resources available for timely issuance of thousands of part 70 permits may not be sufficient to achieve final resolution of NSR permit terms by permit issuance. Serious concerns have been raised by industry that they should not be subject to premature incorporation of these remaining permit terms into the part 70 permit. They believe that this could trigger, in many cases, inappropriate part 70 responsibilities (e.g., monitoring, reporting, and recordkeeping) for these terms.

The EPA believes that the current part 70 rule allows permitting authorities to address these concerns as well. Where States wish to extend the time in which to decide whether to revise, delete, or designate as State-only certain terms of current NSR permits, permitting authorities may stipulate in initial part 70 permits that any of those NSR terms so listed in the permit will be reviewed and be deleted, revised, or incorporated as federally-enforceable terms of the part 70 permit on or before a specified deadline (not later than the renewal of the permit). Prior to the deadline, the permitting authority would delete, revise, or make federally enforceable any terms

that the State determined warranted such treatment. In the meantime, all other terms would continue to be enforceable under State law as terms of the NSR permit. The permitting authority would incorporate any NSR permit terms that were not deleted or designated as State-only into the federally enforceable portion of the part 70 permit consistent with its approved part 70 permit revision procedures.

Finally the permitting authority may be required to add new terms to the part 70 permit to make any incorporated NSR permit terms enforceable from a practical standpoint, to reflect operation rather than construction, or to meet other part 70 requirements regarding the content of permits. Where a permitting authority has already converted the NSR permit into an existing State operating permit before incorporation into the part 70 permit, the terms of the current permit to operate will presumptively define how NSR permit terms should be incorporated into part 70 permits.

8. Section 112(r) Requirements

For sources otherwise required to obtain a part 70 permit, complete applications merely need to acknowledge (where appropriate) that the on-site storage and processing of section 112(r) chemicals may require the source to submit a section 112(r) risk management plan (RMP) when that requirement becomes applicable. This acknowledgment should be based on the "List of Regulated Substances and Their Thresholds" rule [59 FR 4478 (January 14, 1994)]. Sources are not required to quantify emissions of these substances (unless they are also pollutants listed under section 112(b), and such quantification is needed for fee collection purposes). To resolve issues of applicability, permitting authorities may ask for additional information from certain sources regarding materials stored and transferred and the amounts of chemicals used in certain processes if the source does not indicate its potential applicability with respect to the section 112(r) requirement to file an RMP.

9. Research and Development Activities

The EPA expects that R&D activities will generally be exempt from part 70 and not be involved in the part 70 application process since they are typically independent, non-major sources. The July 1992 part 70 preamble provided general guidance explaining that R & D activities could often be regarded as separate "sources" from any operation with which it were co-located (57 FR 32264 and 32269). The Agency is clarifying and confirming their substantial flexibility under the ongoing rulemaking action to revise part 70.

Some R&D activities can still be subject to part 70 because

they are either individually major or a support facility making significant contributions to the product of a collocated major manufacturing facility. In addition, laboratory activities which involve environmental and quality assurance/quality control sample analysis, as well as R&D, present similar permitting problems. Such activities should be eligible for classification as an insignificant activity if there are no applicable SIP requirements. Where applicable SIP requirements do apply, they typically consist of "work practice" (e.g., good laboratory practice) requirements. In this situation, permit applications would need to contain only statements acknowledging the applicability of, and certifying compliance with, these work practice requirements. There is no need for an extensive inventory of chemicals and activities or a detailed description of emissions from the R&D or laboratory activity. Similarly, there would be no need to monitor emissions as a part 70 permit responsibility.

10. Applications from Non-major Sources

Applications for non-major sources subject to part 70 can be less comprehensive than those for major sources. (Note that virtually all States have deferred the applicability of these sources as provided by part 70.) While permits for major sources must include all applicable requirements for all emissions units at the source, § 70.3(c)(2) stipulates that permits for non-major sources have to address only the requirements applicable to emissions units that cause the source to be subject to part 70 (e.g., requirements of sections 111 or 112 of the Act applicable to non-major sources). Other emissions units at non-major sources that do not trigger part 70 applicability, even if they are subject to applicable requirements, do not have to be included in the permit. Since permits for non-major sources do not have to include applicable requirements for emissions units that do not cause the source to be subject to part 70, no information on those units is needed in the permit application.

11. Supporting Information

The great majority of the detailed background information relied upon by the source to prepare the application need not be included in the application for it to be found complete. Even though certain emissions-related calculations [see § 70.5(c)(3)(viii)] are required, the application size can still be significantly reduced if the permitting authority allows the source to submit examples of calculations performed that illustrate the methodology used. Cost savings can be realized, even though the calculations are still performed, in that the efforts to exhaustively record them in the application can be omitted.

The permitting authority can request additional, more

58

detailed information needed to justify any questionable information or statement contained in the initial application or to write a comprehensive part 70 draft permit. Applications for permits which will establish a requirement uniquely found in the part 70 permit (such as an alternative reasonably available control technology (RACT) limit) would require more supporting information, including any required demonstration.

C. Quality of Required Information

The quality of emissions estimates where they are needed in the part 70 permit application depends on the reasonable availability of the necessary information and on the extent to which they are relied upon by the permitting authority to resolve disputed questions of major source status, applicability of requirements, and/or compliance with applicable requirements. In general, where estimates of emissions are necessary, reasonably-available information may be used.

Generally, the emissions factors contained in EPA's publication AP-42 and other EPA documents may be used to make any necessary calculation of emissions. When an acceptable range of values is defined for a general type of source situation, permitting authorities have considerable discretion to define the appropriate emissions factor value within that range. States are most often better able to make such decisions given their closer proximity to the particular source and its operation.

For purposes of certifying the truth and accuracy of the application, part 70 requires that emissions estimates be expressed in terms consistent with the applicable requirement. This does not mean that only test data is acceptable. Rather, the source may rely on any data using the same units and averaging times as in the test method. New testing is not required and emission factors are presumed to be acceptable for emissions calculations, but more accurate data are preferred if they are readily available. Emissions factors provided by permitting authorities are also allowed where EPA emission factors are missing or State or industry values provide greater accuracy. The applicant may also use other estimation methods (materials balance, source test, or continuous emissions monitoring (CEM) data) when emission estimates produced through the use of emission factors are not appropriate.

In disputed cases, the source may propose the least costly alternative estimation method as long as it will produce acceptable data. Owners and operators may propose use of emissions estimation methods of their choosing to the permitting authority when the resulting data is more accurate than that obtained through the use of emissions factors. Sources are encouraged to contact the permitting authority to discuss the appropriate estimation techniques for a particular circumstance.

Emissions estimates when they are necessary for HAPs often become less precise below certain thresholds. The need for quantification or even estimation should therefore decrease the lower the levels are that are present. For example, VOC estimates based on manufacturer's safety data sheets may indicate that trace amounts of certain HAPs may be present. It is reasonable for the source to report these HAPs as present in trace amounts and not quantify them further or perform expensive testing procedures to collect more accurate data, unless the permitting authority requires otherwise. On the other hand, more precise estimates might be required to defend a position that a VOC source was below emissions cutoffs which subject it to a RACT requirement if the source appeared close to that threshold and it exact emissions level was in doubt.

D. Phase-In of Details for Completeness Determinations

Permitting authorities have considerable flexibility in processing the expected huge volume of permit applications so as to issue initial permits by the required deadline of 3 years after program approval. The § 70.5(c) requirement that a permit application will be complete only if it addresses all the information required in this section must be interpreted in light of the July 1992 preamble (which clarifies the § 70.5(c) requirement for completeness in terms of information needed by the permitting authority to begin processing of an application). Accordingly, the permitting authority may balance the need for information to support timely permit issuance pursuant to the schedule approved in the program against the workload associated with managing and updating as necessary the initially submitted information.

Sources must submit complete applications within 12 months of the effective date (i.e., 30 days after the Federal Register date where EPA approves the program) of a State part 70 program or on whatever schedule for application submittal the State establishes in its approved program for its sources. Permitting authorities may also require application submittals prior to part 70 program approval under State authority, however, a failure to comply with any application deadline earlier than the effective date for the program cannot be considered a violation of the Act.

The current rule allows permitting authorities to implement a two-step process for application completeness, first determining an application to be administratively complete, then requiring application updates as needed to support draft permit preparation. For example, permitting authorities can initially find an application complete if it defines the applicable requirements, and major/minor source status; certifies compliance status with respect to all applicable requirements (subject to the limitation on this action provided for in Section H.

Compliance Certification Issues); and allows the permitting authority to determine the approved permit issuance schedule. The application must also include a certification as to its truth, accuracy, and completeness. In any event, permitting authorities must award the application shield if the source submits a timely application which meets the criteria for completeness in § 70.5(c).

Under this approach, if the source has supplied at least initial information in all the areas required by the permit application form and has certified it appropriately, the permitting authority generally has flexibility to judge the application to be complete enough to begin processing. Accordingly, there should normally be no need for an applicant to submit an application many days in advance in order to build in extra time for an iterative process before the relevant submittal deadline. Sources scheduled for permitting during the first year of the transition schedule must submit any additional information as needed to meet fully the requirements of § 70.5(c) for completeness on a more immediate schedule so that their permit can be issued within that first year.

E. Updates to Initially Complete Applications Due to Change

Sources, to maintain their application's status as complete and therefore preserve the application shield, must respond to requests from the permitting authority for additional information to determine or evaluate compliance with applicable requirements within the reasonable timeframe established by the permitting authority. Where more information is needed in the permit application to continue its processing, permitting authorities may opt to add the additional information to the application themselves or require additional submittals from the source. Sources must promptly certify any additional information submitted by them and certify or revise any relevant information furnished by the permitting authority.

1. Changing Emissions Information

Updates to the initially complete application may be required if emissions information, such as revised emissions factors, changes or additional NSR projects are approved after an application is submitted. The exact response required will depend in part on whether the change affects a source's applicable requirements or its compliance status and when it is discovered. If, after consultation with the permitting authority, it is determined that the applicability status of the source is affected by new emissions information (e.g., the change causes the source to become newly subject to applicable requirements or may affect its ability to comply with a current NSR permit condition), then the source must promptly submit the new information to the permitting authority, identify any new

requirements that apply, and certify any change in the source's compliance status. The issuance of an NSR permit may also add a new applicable requirement that would need to be addressed by the part 70 permit.

If the new information is discovered before the draft permit has been issued, it should be submitted as an addendum to the application, and the draft permit should reflect the new information. The permitting authority and a source can agree on set intervals at which such updating is required in order to structure the process and make it more efficient. If new information is discovered after the draft permit has completed public review but before the proposed permit has been issued, the information should still be submitted, and it is the responsibility of the permitting authority to revise the permit accordingly.

If new information is discovered after the permit has been issued, the resulting change could, at the discretion of the permitting authority, be addressed as a permit revision or as a reopening. If the change would not allow a source to comply with its current permit, the source should initiate a permit revision.

If the information does not affect applicability of, or compliance with, any applicable requirement (e.g., only alters the tpy emissions estimates of regulated pollutants), the information need not be submitted until permit renewal. If the permitting authority requires submittal of new information earlier, however, then it must be submitted according to reasonable deadlines established by the permitting authority.

2. Other Changes

Other changes can also occur that would require the source, even absent a specific request from the permitting authority, to propose an update to an initially complete application. One example is where a new regulatory requirement becomes applicable to the source before the permit is issued.

F. Content Streamlining

1. Cross Referencing

The permitting authority may allow the application to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the referenced materials are currently applicable and available to the public. The accuracy of any description of such cross-referenced documents is subject to the certification requirements of part 70. Such documents must be made available as part of the

public docket on the permit action, unless they are published and/or are readily available (e.g., regulations printed in the Code of Federal Regulations or its State equivalent). In addition, materials that are available elsewhere within the same application can be cross referenced to another section of the application.

In many cases, incorporation of prior information from previously issued permits would be useful. Examples are where a source is updating a part 70 permit by referencing the appropriate terms of a NSR permit or renewing a part 70 permit by referencing the current permit and certifying that no change in source operation or in the applicable requirements has occurred. Even where existing permit conditions are expressed in terminology other than that used in the part 70 permit, cross-referencing can still be possible. Such citations, however, would have to provide sufficient translations of terms to ensure the same effect.

As discussed previously, the permitting authority may determine that certain terms and conditions of existing NSR permits are obsolete, environmentally insignificant, or not germane with respect to their incorporation into part 70 permits. Even when a NSR permit contain such terms, citation can still be used to the extent that the NSR permit provisions appropriate for part 70 permit incorporation are clearly identified through the cross-reference. Also, the NSR permit terms not cited for part 70 incorporation are still in effect as a matter of State law unless and until expressly deleted by the permitting authority. Wherever this citation approach is used, the permitting authority should review all referenced terms to ensure they meet part 70 requirements for enforceability.

The EPA believes that one reason for the excessive length and cost of some permit applications is that sources believe they are required to paraphrase or re-state in their entirety the provisions of the Code of Federal Regulations (CFR) or other repositories of applicable requirements. Citations can be used to streamline how applicable requirements are described in an application and will also facilitate compliance by eliminating the possibility that part 70 permit terms will conflict with underlying substantive requirements. Indeed, many States have taken a citation-based approach as a way of streamlining applications and permits. Thus, a source could cite, rather than repeat in its application, the often extensive details of a particular applicable requirement (including current NSR permit terms), provided that the requirement is readily available and its manner of application to the source is not subject to interpretation. The citation must be clear with respect to limits and other requirements that apply to each subject emissions unit or activity. For example, a storage tank subject to subpart Kb of the NSPS would cite that requirement in its

application rather than re-typing the provisions of the CFR.

2. Incorporation of Part 70 Applications by Reference into Permits

The EPA discourages the incorporation of entire applications by reference into permits. The concern with incorporation of the application by reference into the permit on a wholesale basis is the confusion created as to the requirements that apply to the source and the unnecessary limits to operational flexibility that such an incorporation might cause.

If States do incorporate part 70 applications by reference in their entirety into part 70 permits, EPA will consider information in the application to be federally enforceable only to the extent it is needed to make other necessary terms and conditions enforceable from a practical standpoint. Moreover, EPA does not interpret part 70 to require permit revisions for changes in the other aspects of the application.

3. Changing Application Forms

The EPA urges States to re-examine their permit application forms in light of their experience to date and the contents of this guidance. Although the revision of an application form requires a program revision when it impacts any portion of the form which was relied upon by EPA in approving the part 70 program for the State, such a revision can, in most cases, be accomplished through an exchange of letters with the appropriate EPA Regional Office. Changes made to implement this guidance can be effected immediately with implementing documents sent to the appropriate EPA Regional Office. Similarly, a State could notify the Regional Office in writing that the State intends to make completeness determinations based on completion of parts of the existing forms to avoid costly changes in computerized form systems that have already been developed. This is another way that a State can act quickly to streamline application requirements while minimizing its own administrative burdens.

G. Responsible Official

Part 70 provides that a "responsible official" must perform certain important functions. In general, responsible officials must certify the truth, accuracy, and completeness of all applications, forms, reports, and compliance certifications required to be submitted by the operating permits program [§ 70.5(d)]. As an example, a responsible official must certify the truth, accuracy, and completeness of all information submitted as part of a permit application [§ 70.5(a)(2)] and that the source is in compliance "with all applicable requirements" under the Act [§ 70.5(c)(9)(i)]. In addition, part 70 requires responsible officials to certify monitoring reports, which must

64
25

be submitted every 6 months, and "prompt" reports of any deviations from permit requirements whenever they occur.

The definition of responsible official in § 70.2 identifies specific categories of officials that have the requisite authority to carry out the duties associated with that role. The definition provides in part that the following corporate officials may be a responsible official:

> . . . a president, secretary, treasurer, or vice president or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit . . . . [emphasis added]

Similarly, for public agencies, the definition indicates the following persons may be responsible officials:

> . . . a principal executive officer or ranking elected official. For purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency . . . . [emphasis added]

Concerns have been raised over the apparent narrowness of the current definition of responsible official. In the August 1994 Federal Register notice, EPA responded to those concerns related to acid rain by proposing a revision to the definition of responsible official to allow a person other than the designated representative to be the responsible official for activities not related to acid rain control at affected sources [59 FR 44527].

To respond to further concerns over the definition of responsible official as it applies to partnerships formed by corporations, or partnerships, or a combination of both, EPA confirms that the same categories of officials who can act as responsible officials for corporations can also act in that capacity for partnerships where they carry out responsibilities substantially similar to those in the same categories in corporations. Partnerships that are essentially unions of corporations and/or partnerships will normally have the same management needs as corporations and so will establish a management structure with categories of officials similar to those of most corporations. In these partnerships, the persons with the knowledge and authority to assure regulatory compliance are the officials of the partnership.

Interpreting the definition of responsible official as limiting the class of persons in partnerships that may be

responsible officials to general partners would frustrate the intent of the definition because it would in many instances actually result in designating a person that is not in a position to adequately fulfill the role of a responsible official. For this reason, EPA believes it is reasonable for permitting authorities, in the case of partnerships composed of corporations and/or partnerships, to allow for the same flexibility in designating a responsible official as would be the case for corporations.

H. Compliance Certification Issues

To make the required compliance certification to accompany the initial part 70 permit applications, sources are required to review current major and minor NSR permits and other permits containing Federal requirements, SIP's and other documents, and other Federal requirements in order to determine applicable requirements for emission units. The EPA and/or the State permitting authority may request additional information concerning a source's emissions as part of the part 70 application process.

Companies are not federally required to reconsider previous applicability determinations as part of their inquiry in preparing part 70 permit applications. However, EPA expects companies to rectify past noncompliance as it is discovered. Companies remain subject to enforcement actions for any past noncompliance with requirements to obtain a permit or meet air pollution control obligations. In addition, the part 70 permit shield is not available for noncompliance with applicable requirements that occurred prior to or continues after submission of the application.

ATTACHMENT A

LIST OF ACTIVITIES THAT MAY BE TREATED AS "TRIVIAL"

The following types of activities and emissions units may be presumptively omitted from part 70 permit applications. Certain of these listed activities include qualifying statements intended to exclude many similar activities.

Combustion emissions from propulsion of mobile sources, except for vessel emissions from Outer Continental Shelf sources.

Air-conditioning units used for human comfort that do not have applicable requirements under title VI of the Act.

Ventilating units used for human comfort that do not exhaust air pollutants into the ambient air from any manufacturing/industrial or commercial process.

Non-commercial food preparation.

Consumer use of office equipment and products, not including printers or businesses primarily involved in photographic reproduction.

Janitorial services and consumer use of janitorial products.

Internal combustion engines used for landscaping purposes.

Laundry activities, except for dry-cleaning and steam boilers.

Bathroom/toilet vent emissions.

Emergency (backup) electrical generators at residential locations.

Tobacco smoking rooms and areas.

Blacksmith forges.

Plant maintenance and upkeep activities (e.g., grounds-keeping, general repairs, cleaning, painting, welding, plumbing, re-tarring roofs, installing insulation, and paving parking lots) provided these activities are not conducted as part of a manufacturing process, are not related to the source's primary business activity, and not

otherwise triggering a permit modification.[1]

Repair or maintenance shop activities not related to the source's primary business activity, not including emissions from surface coating or de-greasing (solvent metal cleaning) activities, and not otherwise triggering a permit modification.

Portable electrical generators that can be moved by hand from one location to another[2].

Hand-held equipment for buffing, polishing, cutting, drilling, sawing, grinding, turning or machining wood, metal or plastic.

Brazing, soldering and welding equipment, and cutting torches related to manufacturing and construction activities that do not result in emission of HAP metals.[3]

Air compressors and pneumatically operated equipment, including hand tools.

Batteries and battery charging stations, except at battery manufacturing plants.

Storage tanks, vessels, and containers holding or storing liquid substances that will not emit any VOC or HAP.[4]

---

[1]Cleaning and painting activities qualify if they are not subject to VOC or HAP control requirements. Asphalt batch plant owners/operators must still get a permit if otherwise required.

[2]"Moved by hand" means that it can be moved without the assistance of any motorized or non-motorized vehicle, conveyance, or device.

[3]Brazing, soldering and welding equipment, and cutting torches related to manufacturing and construction activities that emit HAP metals are more appropriate for treatment as insignificant activities based on size or production level thresholds. Brazing, soldering, welding and cutting torches directly related to plant maintenance and upkeep and repair or maintenance shop activities that emit HAP metals are treated as trivial and listed separately in this appendix.

[4]Exemptions for storage tanks containing petroleum liquids or other volatile organic liquids should be based on size limits such as storage tank capacity and vapor pressure of liquids stored and are not appropriate for this list.

Storage tanks, reservoirs, and pumping and handling equipment of any size containing soaps, vegetable oil, grease, animal fat, and nonvolatile aqueous salt solutions, provided appropriate lids and covers are utilized.

Equipment used to mix and package, soaps, vegetable oil, grease, animal fat, and nonvolatile aqueous salt solutions, provided appropriate lids and covers are utilized.

Drop hammers or hydraulic presses for forging or metalworking.

Equipment used exclusively to slaughter animals, but not including other equipment at slaughterhouses, such as rendering cookers, boilers, heating plants, incinerators, and electrical power generating equipment.

Vents from continuous emissions monitors and other analyzers.

Natural gas pressure regulator vents, excluding venting at oil and gas production facilities.

Hand-held applicator equipment for hot melt adhesives with no VOC in the adhesive formulation.

Equipment used for surface coating, painting, dipping or spraying operations, except those that will emit VOC or HAP.

CO_2 lasers, used only on metals and other materials which do not emit HAP in the process.

Consumer use of paper trimmers/binders.

Electric or steam-heated drying ovens and autoclaves, but not the emissions from the articles or substances being processed in the ovens or autoclaves or the boilers delivering the steam.

Salt baths using nonvolatile salts that do not result in emissions of any regulated air pollutants.

Laser trimmers using dust collection to prevent fugitive emissions.

Bench-scale laboratory equipment used for physical or chemical analysis, but not lab fume hoods or vents.[3]

---

[3]Many lab fume hoods or vents might qualify for treatment as insignificant (depending on the applicable SIP) or be grouped together for purposes of description.

69

Routine calibration and maintenance of laboratory equipment or other analytical instruments.

Equipment used for quality control/assurance or inspection purposes, including sampling equipment used to withdraw materials for analysis.

Hydraulic and hydrostatic testing equipment.

Environmental chambers not using hazardous air pollutant (HAP) gasses.

Shock chambers.

Humidity chambers.

Solar simulators.

Fugitive emission related to movement of passenger vehicles, provided the emissions are not counted for applicability purposes and any required fugitive dust control plan or its equivalent is submitted.

Process water filtration systems and demineralizes.

Demineralized water tanks and demineralizer vents.

Boiler water treatment operations, not including cooling towers.

Oxygen scavenging (de-aeration) of water.

Ozone generators.

Fire suppression systems.

Emergency road flares.

Steam vents and safety relief valves.

Steam leaks.

Steam cleaning operations.

Steam sterilizers.

MEMORANDUM

SUBJECT: Review of 40 CFR part 71

FROM: Candace Carraway Candace Carraway

TO: Art Fraas

DATE: February 1, 1996

Attached are three documents related to the part 71 rulemaking package. The first document highlights the major issues in the rulemaking.

The second document is a redline/strikeout version of the part 71 final rule, which uses the current part 70 rule as a baseline. We hope this will aid your review of part 71.

Third, there is a permit application form that may be used for part 71 programs, which is technically an attachment to the ICR. The part 71 rule would also allow a State form to be used, provided it met the requirements of part 71. (The EPA expects that particularly where the program is delegated, it would be less disruptive for sources to use a modified State form.)

If you have questions about these documents, please call me at (919) 541-3189.

71

MEMORANDUM:

SUBJECT: Outline of Issues in Part 71 package

FROM: Candace Carraway

TO: Art Fraas

DATE: February 1, 1996

Overall approach: interim rule based on current part 70 rule

Part 71 will be finalized in two phases. Phase I serves as an interim rule until part 70 is fixed and final. We expect to promulgate a "catch-up" or "conforming" rulemaking for part 71 contemporaneously with the part 70 rulemaking (fall of 1996). Part 71 is modeled on current part 70 which should make transition between part 71 programs and part 70 programs easier. There were some obvious trade-offs in the decision to use current part 70 as the template for fashioning our Phase I rule. The big gain is that it is the quickest way to finalize the rule (since comments on the proposed revisions to part 70 have not been fully reviewed and analyzed); the loss is that we temporarily delayed many improvements and refinements suggested in more recent proposals (such as the August 1994 proposed revisions for part 70).

The preamble discusses at length our rationale for using the current part 70 template and identifies which provisions of the proposal were changed as a result. This memo focuses mostly on issues that are **not** governed by Phase I's marriage with current 70, though the list of issues herein is not meant to be definitive.

Definitions - § 71.2

1. title I mod: No definition is included in the reg, but preamble discussion says we'll interpret it for part 71 in the same manner as we are interpreting it for part 70 (i.e., term does not include minor NSR).

2. Affected State definition with respect to Tribes: Our interpretation of section 301(d) of the Act is EPA may not treat Tribes as affected States unless they have met eligibility criteria under section 301(d). However, in a separate provision (71.8) the rule requires the permitting authority to give notice of relevant permitting actions to all federally recognized Tribes.

3. PTE: No definition will be adopted until part 70 is final, but preamble says that on an interim basis (pending a future PTE rulemaking) limits that are enforceable by the State will be considered a limit on the source's PTE for part 71 purposes,

consistent with Seitz memorandum of January 25, 1995.

4. Tribal area: This term is not defined in Phase I because it is tied to the rule's approach to Tribal jurisdiction, which we cannot finalize yet because our proposal said we would follow the approach taken in the Tribal air rule which is not going to be final for several months. Regions will be unable to establish part 71 programs on Tribal lands until a subsequent rulemaking settles jurisdictional issues and the procedural issues related to boundary determinations (but Regions could establish program through a separate rulemaking). Preamble indicates that we will finalize these issues either in Phase II or in conjunction with the Tribal air rule, both of which should be completed well in advance of the Nov. 1997 deadline for establishing programs on Tribal lands.

Implementation - § 71.4

1. Don't publish the Delegation Agreement itself: Rule was changed to this effect.

2. Tribal jurisdictional and boundary issues: Deferred until subsequent rulemaking.

Applications - § 71.5

1. Insignificant activities: Emission level cut-off was raised for criteria pollutants from 1 tpy to 2 tpy. Aggregate caps on criteria and HAP emissions have been deleted. List of specific insignificant activities (such as consumer use of office equipment and products) remains in the rule. Preamble indicates the white paper is generally applicable to part 71.

2. Minimum notice of permit application deadline: Enlarged from 120 to 180 days.

Affected State Review - § 71.8

1. Notice to Indian Tribes: New provision requires notice of draft permits to all federally recognized Tribes whose air quality may be affected and that are contiguous to or within 50 miles of permitted source, in keeping with our government-to-government relationship with Tribes.

Permit Fees - § 71.9

1. Fee amounts: Fees are much lower due primarily to change in permit revision procedures. When EPA runs the program, fees are $32 per ton (down from $45) plus the cost of permit revisions. When the streamlined permit revision procedures get finalized in Phase

II, an additional $4 is owed. The surcharge that would have covered the costs of EPA oversight of contractors and delegated programs was eliminated.

2. Fees for delegated programs: Rule establishes separate lower fee for delegated programs. For delegated programs where EPA does not waive fee collection, fees will be $28 tpy. EPA may waive fee collection where program is fully delegated and State has adequate authority and revenue under State law to fund the delegated activities. Rule contains a formula for fees when program has been partially delegated.

3. Penalties: The margin of error for underestimating HAP emissions was raised from 20% to 50%, but remains at 20% for criteria emissions.

4. Certification requirement: Explicit requirement for certification of fee calculation worksheets was added.

Administrative record, public participation, and administrative review - § 71.11

1. Severability and appeal of permits: Rule has been changed to clarify that only the appealed terms are stayed pending the appeal.

Redline/strikeout version that compares final part 71 rule to current part 70 rule with respect to sections that are modeled on part 70 provisions (i.e., 71.2, 71.3, 71.5, 71.6, 71.7, 71.8).

§ 71.2 Definitions.

The following definitions apply to part 71. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable requirements of the Act.

Act means the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

Affected source shall have the meaning given to it in 40 CFR 72.2.

Affected States are:

(1) All States and Tribal areas whose air quality may be affected and that are contiguous to the State or Tribal area in which the permit, permit modification or permit renewal is being proposed; or that are within 50 miles of the permitted source. A Tribe and any associated Tribal area shall be treated as a State under this paragraph (1) only if EPA has determined that the Tribe is an eligible Tribe.

(2) The State or Tribal area in which a part 71 permit, permit modification, or permit renewal is being proposed. A Tribe and any associated Tribal area shall be treated as a State under this paragraph (2) only if EPA has determined that the Tribe is an eligible Tribe.

(3) Those areas within the jurisdiction of the air pollution control agency for the area in which a part 71 permit, permit modification, or permit renewal is being proposed.

Affected unit shall have the meaning given to it in 40 CFR § 72.2.

Applicable requirement means all of the following as they apply to emissions units in a part 71 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or 40 CFR parts 72 through 78;

(6) Any requirements established pursuant to section 114(a)(3) or 504(b) of the Act;

(7) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(8) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(9) Any standard or other requirement for tank vessels, under section 183(f) of the Act;

(10) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(11) Any standard or other requirement of the regulations promulgated at 40 CFR part 82 to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(12) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

Delegate agency means the State air pollution control agency, local agency, other State agency, Tribal agency, or other agency authorized by the Administrator pursuant to § 71.10 to carry out all or part of a permit program under part 71.

Designated representative shall have the meaning given to it in section 402(26) of the Act and 40 CFR § 72.2.

Draft permit means the version of a permit for which the permitting authority offers public participation under § 71.7 or § 71.11 and affected State review under § 71.8.

Eligible Indian Tribe or eligible Tribe means a Tribe that has been determined by EPA to meet the criteria for being treated in the same manner as a State, pursuant to the regulations implementing section 301(d)(2) of the Act.[1]

Emissions allowable under the permit means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term "unit" for purposes of title IV of the Act.

The EPA or the Administrator means the Administrator of the U.S. Environmental Protection Agency (EPA) or his or her designee.

Federal Indian reservation, Indian reservation or reservation means all land within the limits of any Indian

---

[1]Proposed rule entitled"Indian Tribes: Air Quality Planning and Management", 59 FR 43956 (August 25, 1994).

reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Final permit means the version of a part 71 permit issued by the permitting authority, which has completed all review procedures required by §§ 71.7, 71.8, and 71.11.

Fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

General permit means a part 71 permit that meets the requirements of § 71.6(d).

Indian Tribe or Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaskan native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)), belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining "major source", a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

(1) A major source under section 112 of the Act, which is defined as:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) For radionuclides, "major source" shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants or any group of stationary sources as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the

77

Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers);
(ii) Kraft pulp mills;
(iii) Portland cement plants;
(iv) Primary zinc smelters;
(v) Iron and steel mills;
(vi) Primary aluminum ore reduction plants;
(vii) Primary copper smelters;
(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;
(ix) Hydrofluoric, sulfuric, or nitric acid plants;
(x) Petroleum refineries;
(xi) Lime plants;
(xii) Phosphate rock processing plants;
(xiii) Coke oven batteries;
(xiv) Sulfur recovery plants;
(xv) Carbon black plants (furnace process);
(xvi) Primary lead smelters;
(xvii) Fuel conversion plants;
(xviii) Sintering plants;
(xix) Secondary metal production plants;
(xx) Chemical process plants;
(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(xxiii) Taconite ore processing plants;
(xxiv) Glass fiber processing plants;
(xxv) Charcoal production plants;
(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or
(xxvii) All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category;

(3) A major stationary source as defined in part D of title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme;" except that the references in this paragraph (3)(i) to 100, 50, 25, and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas:

(A) That are classified as "serious," and

(B) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide; and

(iv) For particulate matter (PM-10) nonattainment areas classified as "serious," sources with the potential to emit 70 tpy or more of PM-10.

Part 70 permit means any permit or group of permits covering a part 70 source that has been issued, renewed, amended or revised pursuant to 40 CFR part 70.

Part 70 program or State program means a program approved by the Administrator under 40 CFR part 70.

Part 70 source means any source subject to the permitting requirements of 40 CFR part 70, as provided in § § 70.3(a) and 70.3(b).

Part 71 permit, or permit (unless the context suggests otherwise) means any permit or group of permits covering a part 71 source that has been issued, renewed, amended or revised pursuant to this part.

Part 71 program means a Federal operating permits program under this part.

Part 71 source means any source subject to the permitting requirements of this part, as provided in § § 71.3(a) and 71.3(b).

Permit modification means a revision to a part 71 permit that meets the requirements of §71.7(e) of this part.

Permit program costs means all reasonable (direct and indirect) costs required to administer an operating permits program, as set forth in § 71.9(b).

Permit revision means any permit modification or administrative permit amendment.

Permitting authority means one of the following:

(1) The Administrator, in the case of EPA-implemented programs;

(2) A delegate agency authorized by the Administrator to carry out a Federal permit program under this part; or

(3) The State air pollution control agency, local agency, other State agency, Indian Tribe, or other agency authorized by the Administrator to carry out a permit program under 40 CFR part 70.

Proposed permit means the version of a permit that the delegate agency proposes to issue and forwards to the Administrator for review in compliance with § 71.10(d).

Regulated air pollutant means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 of the Act or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act, including the following:

(i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Act, any pollutant for which a subject source would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to section 112(e) of the Act; and

(ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to section 112(g)(2) requirements.

Regulated pollutant (for fee calculation), which is used only for purposes of § 71.9(c), means any regulated air pollutant except the following:

(1) Carbon monoxide;

(2) Any pollutant that is a regulated air pollutant solely because it is a Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(3) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act.

Renewal means the process by which a permit is reissued at the end of its term.

Responsible official means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) the delegation of authority to such representative is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal

geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected sources:

(i) The designated representative insofar as actions, standards, requirements, or prohibitions under title IV of the Act or 40 CFR parts 72 through 78 are concerned; and

(ii) The designated representative for any other purposes under part 71.

Section 502(b)(10) changes are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

State means any non-Federal permitting authority, including any local agency, interstate association, or statewide program. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas Islands. Where such meaning is clear from the context, "State" shall have its conventional meaning. For purposes of the acid rain program, the term "State" shall be limited to authorities within the 48 contiguous States and the District of Columbia as provided in section 402(14) of the Act.

Stationary source means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.

§ 71.3 Sources Subject to Permitting Requirements.

(a) Part 71 sources. The following sources are subject to the permitting requirements under this part:

(1) Any major source;

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of the Act;

(4) Any affected source; and

(5) Any source in a source category designated by the Administrator pursuant to this section.

(b) Source category exemptions.

(1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act are exempted from the obligation to obtain a part 71 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any

permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or 112 of the Act after July 21, 1992 publication, the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 or part 71 permit at the time that the new standard is promulgated.

(3) Any source listed in paragraph (a) of this section exempt from the requirement to obtain a permit under this section may opt to apply for a permit under a part 71 program.

(4) **The following source categories** are exempted from the obligation to obtain a part 71 permit:

(i) All sources and source categories that would be required to obtain a permit solely because they are subject to part 60, subpart AAA---Standards of Performance for New Residential Wood Heaters; and

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to part 61, subpart M - National Emission Standard for Hazardous Air Pollutants for Asbestos, § 61.145, Standard for Demolition and Renovation.

(c) Emissions units and part 71 sources.

(1) For major sources, the permitting authority shall include **in the permit all applicable requirements for all relevant emissions units in the major source.**

(2) **For any nonmajor source subject to the part 71 program** under paragraphs (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 71 program.

(d) Fugitive emissions. Fugitive emissions from a part 71 source shall be included in the permit application and the part 71 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

§71.5 Permit applications.

(a) Duty to apply. For each part 71 source, the owner or operator shall submit a timely and complete permit application in accordance with this section.

(1) Timely application.

(i) A timely application for a source which does not have an existing operating permit issued by a State under the State's approved part 70 program and is applying for a part 71 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish. Sources required to submit applications earlier than 12 months after the source becomes subject to the permit program will be

notified of the earlier submittal date at least 6 months in advance of the date.

(ii) Part 71 sources required to meet the requirements under section 112(g) of the Act, or to have a permit under the preconstruction review program approved into the applicable implementation plan under part C or D of title I of the Act, shall file a complete application to obtain the part 71 permit or permit revision within 12 months after commencing operation or on or before such earlier date as the permitting authority may establish. Sources required to submit applications earlier than 12 months after the source becomes subject to the permit program will be notified of the earlier submittal date at least 6 months in advance of the date. Where an existing part 70 or 71 permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.

(iii) For purposes of permit renewal, a timely application is one that is submitted at least 6 months but not more that 18 months prior to expiration of the part 70 or 71 permit. ~~prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed. In no event shall this time be greater than 18 months.~~

(iv) Applications for initial phase II acid rain permits shall be submitted to the permitting authority by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

(2) Complete application. ~~The program shall provide criteria and procedures for determining in a timely fashion when applications are complete.~~ To be deemed complete, an application must provide all information required pursuant to paragraph (c) of this section, except that applications for permit revision need supply such information only if it is related to the proposed change. Information required under paragraph (c) of this section must be sufficient to evaluate the subject source and its application and to determine all applicable requirements. ~~The program shall require that~~ A responsible official must certify the submitted information consistent with paragraph (d) of this section. Unless the permitting authority determines that an application is not complete within 60 days of receipt of the application, such application shall be deemed to be complete, except as otherwise provided in §71.7(a)(4) of this part. If, while processing an application that has been determined or deemed to be complete, the permitting authority determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response. The source's ability to operate without a permit, as set forth in §71.7(b), shall be in effect from the date the application is determined or deemed to be complete until the final permit is issued, provided that the applicant submits any requested additional information by the deadline specified by the permitting authority.

(3) Confidential information. ~~In the case where a source has submitted information to the State under a claim of confidentiality, the permitting authority may also require the source to submit a copy of such information directly to the Administrator~~An applicant may assert a business confidentiality claim for information requested by the permitting authority using procedures found at part 2, subpart B of this chapter.

(b) Duty to supplement or correct application. Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(c) Standard application form and required information. The ~~State program under this part~~permitting authority shall provide ~~for~~sources a standard application form or forms. The permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency. The forms and attachments chosen, however, shall include the elements specified below. ~~Information as described below for each emissions unit at a part 71 source shall be included in the application. The Administrator may approve as part of a State program a list of insignificant activities and emissions level which need not be included in permit applications. However, for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application.~~ An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the schedule ~~approved~~established pursuant to §71.9 of this part. ~~The permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency. The forms and attachments chosen, however, shall include the elements specified below:~~

(1) Identifying information, including company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager/contact.

(2) A description of the source's processes and products (by Standard Industrial Classification Code) including any associated with each alternate scenario identified by the source.

(3) The following emissions-related information:

(i) All emissions of pollutants for which the source is major, and all emissions of regulated air pollutants. A permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit, except where such units are exempted under this paragraph (c) of this section. The permitting authority shall require additional information related to the emissions of air pollutants sufficient to verify which

84

requirements are applicable to the source, and other information necessary to collect any permit fees owed under the fee schedule ~~approved~~established pursuant to §71.9(b) of this part.

(ii) Identification and description of all points of emissions described in paragraph (c)(3)(i) of this section in sufficient detail to establish the basis for fees and applicability of requirements of the Act.

(iii) Emissions rates in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method.

(iv) The following information to the extent it is needed to determine or regulate emissions: fuels, fuel use, raw materials, production rates, and operating schedules.

(v) Identification and description of air pollution control equipment and compliance monitoring devices or activities.

(vi) Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated pollutants at the part 71 source.

(vii) Other information required by any applicable requirement (including information related to stack height limitations developed pursuant to section 123 of the Act).

(viii) Calculations on which the information in paragraphs (c)(3)(i) through (vii) of this section is based.

(4) The following air pollution control requirements:

(i) Citation and description of all applicable requirements, and

(ii) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

(5) Other specific information that may be necessary to implement and enforce other applicable requirements of the Act or of this part or to determine the applicability of such requirements.

(6) An explanation of any proposed exemptions from otherwise applicable requirements.

(7) Additional information as determined to be necessary by the permitting authority to define alternative operating scenarios identified by the source pursuant to §71.6(a)(9) or to define permit terms and conditions implementing ~~§70.4(b)(12)~~71.6(a)(10) or ~~§70.5(a)(10)~~71.6(a)(13) of this part.

(8) A compliance plan for all part 71 sources that contains all the following:

(i) A description of the compliance status of the source with respect to all applicable requirements.

(ii) A description as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

(C) For requirements for which the source is not in compliance at the time of permit issuance, a narrative description of how the source will achieve compliance with such requirements.

(iii) A compliance schedule as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

(iv) A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

(v) The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source, except as specifically superseded by regulations promulgated under ~~title IV of the Act~~ parts 72 through 78 of this chapter with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

(9) Requirements for compliance certification, including the following:

(i) A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act;

(ii) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;

(iii) A schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the underlying applicable requirement or by the permitting authority; and

(iv) A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Act.

(10) The use of nationally-standardized forms for acid rain portions of permit applications and compliance plans, as required by regulations promulgated under ~~title IV of the Act.~~parts 72 through 78 of this chapter.

(11) Insignificant activities and emissions levels. ~~The Administrator may approve as part of a State program a list~~The following types of insignificant activities and emissions levels ~~which~~ need not be included in permit applications. However, for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application. An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to calculate the fee amount required under the schedule established pursuant to §71.9 of this part.

(i) Insignificant activities:

(A) Mobile sources;

(B) Air-conditioning units used for human comfort that are not subject to applicable requirements under title VI of the Act and do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process;

(C) Ventilating units used for human comfort that do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process;

(D) Heating units used for human comfort that do not provide heat for any manufacturing or other industrial process;

(E) Noncommercial food preparation;

(F) Consumer use of office equipment and products;

(G) Janitorial services and consumer use of janitorial products; and

(H) Internal combustion engines used for landscaping purposes.

(ii) Insignificant emissions levels. Emissions meeting the criteria in paragraph (c)(11)(ii)(A) or (c)(11)(ii)(B) of this section need not be included in the application, but must be listed with sufficient detail to identify the emission unit and indicate that the exemption applies. Similar emission units, including similar capacities or sizes, may be listed under a single description, provided the number of emission units is included in the description. No additional information is required at time of application, but the permitting authority may request additional information during application processing.

(A) Emission criteria for regulated air pollutants, excluding hazardous air pollutants (HAP). Potential to emit of regulated air pollutants, excluding HAP, for any single emissions unit shall not exceed 2 tpy.

(B) Emission criteria for HAP. Potential to emit of any HAP from any single emissions unit shall not exceed 1,000 lb per

year or the de minimis level established under section 112(g) of the Act, whichever is less.

(d) Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

§ 71.6 Permit content.

(a) Standard permit requirements. Each permit issued under this part shall include the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.

(i) The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

(ii) The permit shall state that, where an applicable requirement of the Act is more stringent than an applicable requirement of ~~regulations promulgated under title IV of the Act~~ 40 CFR parts 72 thorough 78, both provisions shall be incorporated into the permit and shall be enforceable by the Administrator.

(iii) If an applicable implementation plan allows a determination of an alternative emission limit at a part ~~70~~ 71 source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the ~~State~~ permitting authority elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(2) Permit duration. The permitting authority shall issue permits for a fixed term of 5 years in the case of affected sources, and for a term not to exceed 5 years in the case of all other sources. Notwithstanding this requirement, the permitting authority shall issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and shall review such permits at least every 5 years.

(3) Monitoring and related recordkeeping and reporting requirements.

(i) Each permit shall contain the following requirements with respect to monitoring:

(A) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to sections 114(a)(3) or 504(b) of the Act;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. **Recordkeeping provisions may be** sufficient to meet the requirements of this paragraph (a)(3)(i)(B); and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(ii) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require, where applicable, the following:

(A) Records of required monitoring information that include the following:

(1) The date, place as defined in the permit, and time of sampling or measurements;

(2) The date(s) analyses were performed;

(3) **The company or entity that performed the analyses;**

(4) **The analytical techniques or methods used;**

(5) **The results of such analyses; and**

(6) **The operating conditions as existing at the time of** sampling or measurement;

(B) Retention of records of all required monitoring data and support information for a period of at least 5 years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(iii) **With respect to reporting, the permit shall** incorporate all applicable reporting requirements and require the following:

(A) Submittal of reports of any required monitoring at least every 6 months. **All instances of deviations from permit** requirements must be clearly identified in such reports. **All** required reports must be certified by a responsible official consistent with §~~70~~ 71.5(d).

(B) Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. ~~The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.~~ Where the underlying applicable requirement contains a definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame

shall govern. Where the underlying applicable requirement fails to address the time frame for reporting deviations, reports of deviations shall be submitted to the permitting authority based on the following schedule:

(1) For emissions of a hazardous air pollutant or a toxic air pollutant (as identified in an applicable regulation) that continue for more than an hour in excess of permit requirements, the report must be made with 24 hours of the occurrence.

(2) For emissions of any regulated air pollutant, excluding those listed in paragraph (a)(3)(iii)(B)(1) of this section, that continue for more than two hours in excess of permit requirements, the report must be made within 48 hours.

(3) For all other deviations from permit requirements, the report shall be contained in the report submitted in accordance with the timeframe given in paragraph (a)(3)(iii)(A).

(4) A permit may contain a more stringent reporting requirement than required by paragraphs (a)(3)(iii)(B)(1), (2), and (3).

If any of the above conditions are met, the source must notify the permitting authority by telephone or facsimile based on the timetable listed in paragraphs (a)(3)(iii)(B)(1) through (4) of this section. A written notice, certified consistent with § 71.5(d), must be submitted within 10 working days of the occurrence. All deviations reported under paragraph (a)(3)(iii)(A) of this section must also be identified in the 6 month report required under paragraph (a)(3)(iii)(A) of this section.

(C) For purposes of paragraph (a)(3)(iii)(B) of this section, deviation means any condition determined by observation, by data from any monitoring protocol, or by any other monitoring which is required by the permit that can be used to determine compliance, that identifies that an emission unit subject to a part 71 permit term or condition has failed to meet an applicable emission limitation or standard or that a work practice was not complied with or completed. For a condition lasting more than 24 hours which constitutes a deviation, each 24 hour period is considered a separate deviation. Included in the meaning of deviation are any of the following:

(1) A condition where emissions exceed an emission limitation or standard;

(2) A condition where process or control device parameter values demonstrate that an emission limitation or standard has not been met;

(3) Any other condition in which observations or data collected demonstrates noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit.

(4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under ~~title IV of the Act or the regulations promulgated thereunder~~ 40 CFR parts 72 through 78.

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement.

(ii) No limit shall be placed on the number of allowances held by the source. The source may not, however, use allowances as a defense to noncompliance with any other applicable requirement.

(iii) Any such allowance shall be accounted for according to the procedures established in regulations ~~promulgated under title IV of the Act~~ 40 CFR parts 72 through 78.

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

(6) Provisions stating the following:

(i) The permittee must comply with all conditions of the part ~~70~~ 71 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(ii) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(iii) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(iv) The permit does not convey any property rights of any sort, or any exclusive privilege.

(v) The permittee shall furnish to the permitting authority, within a reasonable time, any information that the permitting authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the permitting authority copies of records required to be kept by the permit or, in the case of a program delegated pursuant to § 71.10 of this part, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.

(7) A provision to ensure that a part ~~70~~ 71 source pays fees to the ~~permitting authority~~ Administrator consistent with the fee schedule approved pursuant to §~~70~~ 71.9.

(8) Emissions trading. A provision stating that no permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

(9) Terms and conditions for reasonably anticipated operating scenarios identified by the source in its application as approved by the permitting authority. Such terms and conditions:

(i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the scenario under which it is operating;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such operating scenario; and

(iii) Must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this part.

(10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval of each emissions trade. Such terms and conditions:

(i) Shall include all terms required under ~~§§70.6~~ paragraphs (a) and (c) of this part to determine compliance;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions that allow such increases and decreases in emissions; and

(iii) Must meet all applicable requirements and requirements of this part.

(11) Permit expiration. A provision to ensure that a part 71 permit expires upon the earlier occurrence of the following events:

(i) twelve years elapses from the date of issuance to a solid waste incineration unit combusting municipal waste subject to standards under section 112(e) of the Act; or

(ii) five years elapses from the date of issuance; or

(iii) the source is issued a part 70 permit.

~~70.4(b)(15)~~(12) Off Permit Changes. ~~Provisions prohibiting sources from making, without a permit revision,~~ A provision allowing changes that are not addressed or prohibited by the ~~part 70~~ permit, ~~if such changes are~~ other than those subject to ~~any~~ the requirements ~~under title IV of the Act~~ of 40 CFR parts 72 through 78 or those that are modifications under any provision of title I of the Act~~.~~ to be made without a permit revision, provided that the following requirements are met:

~~70.4(b)(14)~~(i) Each such change shall meet all applicable requirements and shall not violate any existing permit term or condition~~.~~;

~~70.4(b)(14)~~(ii) Sources must provide contemporaneous written notice to the permitting authority (and EPA, in the case of a program delegated pursuant to § 71.10) of each such change, except for changes that qualify as insignificant under ~~the provisions adopted pursuant to§70.5(c) of this part.~~

§ 71.5(c)(11). Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change~~.~~;

~~70.4(b)(14)~~(iii) The change shall not qualify for the shield under §~~70~~ 71.6(f)~~.~~;

~~70.4(b)(14)~~(iv) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

~~70.4(b)(12)~~(13) Operational flexibility. Provisions consistent with paragraphs ~~(b)(12)(i) through (iii)~~(a)(3)(i) through (iii) of this section to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions): Provided, That the facility provides the Administrator (in the case of a program delegated pursuant to § 71.10) and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days~~, unless the permitting authority provides in its regulations a different time frame for emergencies. The source, permitting authority, and EPA shall attach each such notice to their copy of the relevant permit. The following provisions implement this requirement of an approvable part 70 permit program:~~.

~~70.4(b)(12)~~(i) The ~~program~~ permit shall allow the permitted ~~sources~~ source to make section 502(b)(10) changes without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions).

~~70.4(b)(12)(i)~~(A) For each such change, the written notification required above shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

~~70.4(b)(12)(i)~~(B) The permit shield described in § ~~70~~71.6(f) of this part shall not apply to any change made pursuant to this paragraph ~~(b)(12)(i) of this section.~~ (a)(13)(i).

~~70.4(b)(12)~~(ii) The ~~program~~ permit may provide for the permitted source to trade increases and decreases in emissions in the permitted facility, where the applicable implementation plan provides for such emissions trades without requiring a permit revision and based on the 7-day notice prescribed in this paragraph ~~(b)(12)(ii)~~(a)(13)(ii) of this section. This provision

is available in those cases where the permit does not already provide for such emissions trading.

~~70.4(b)(12)(ii)~~(A) Under this paragraph ~~(b)(12)(ii) of this section,~~(a)(13)(ii), the written notification required above shall include such information as may be required by the provision in the applicable implementation plan authorizing the emissions trade, including at a minimum, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the applicable implementation plan, and the pollutants emitted subject to the emissions trade. The notice shall also refer to the provisions with which the source will comply in the applicable implementation plan and that provide for the emissions trade.

~~70.4(b)(12)(ii)~~(B) The permit shield described in ~~§70~~ § 71.6(f) of this part shall not extend to any change made under this paragraph ~~(b)(12)(ii) of this section.~~(a)(13)(ii). Compliance with the permit requirements that the source will meet using the emissions trade shall be determined according to requirements of the applicable implementation plan authorizing the emissions trade.

~~70.4(b)(12)~~(iii) The ~~program~~ permit shall require the permitting authority, if a permit applicant requests it, to issue permits that contain terms and conditions, including all terms required under §§ ~~70~~71.6(a) and (c) of this part to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The permitting authority shall not be required to include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall also require compliance with all applicable requirements.

~~70.4(b)(12)(iii)~~(A) Under this paragraph ~~(b)(12)(iii) of this section,~~(a)(13)(iii), the written notification required above shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

~~70.4(b)(12)(iii)~~(B) The permit shield described in ~~§70~~ § 71.6(f) of this part may extend to terms and conditions that allow such increases and decreases in emissions.

(b) Federally-enforceable requirements.

(1) All terms and conditions in a part ~~70~~ 71 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

94

~~(2) Notwithstanding paragraph (b)(1) of this section, the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§70.7, 70.8, or of this section, other than those contained in this paragraph (b).~~

(c) Compliance requirements. All part ~~70~~ 71 permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Any document (including reports) required by a part ~~70~~ 71 permit shall contain a certification by a responsible official that meets the requirements of § ~~70~~71.5(d).

(2) Inspection and entry requirements that require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the permitting authority or an authorized representative to perform the following:

(i) Enter upon the permittee's premises where a part ~~70~~ 71 source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(ii) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

(iii) Inspect at reasonable times any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(iv) As authorized by the Act, sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

(3) A schedule of compliance consistent with § ~~70~~71.5(c)(8).

(4) Progress reports consistent with an applicable schedule of compliance and § ~~70~~71.5(c)(8) to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. Such progress reports shall contain the following:

(i) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(ii) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

95

(i) The frequency (not less than annually or such more frequent periods as specified in the applicable requirement or by the permitting authority) of submissions of compliance certifications;

(ii) In accordance with § ~~70~~71.6(a)(3), a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices;

(iii) A requirement that the compliance certification include the following:

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The compliance status;

(C) Whether compliance was continuous or intermittent;

(D) The method(s) used for determining the compliance status of the source, currently and over the reporting period consistent with paragraph (a)(3) of this section; and

(E) Such other facts as the permitting authority may require to determine the compliance status of the source;

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority; and

(v) Such additional requirements as may be specified pursuant to sections 114(a)(3) and 504(b) of the Act.

(6) Such other provisions as the permitting authority may require.

(d) General permits.

(1) The permitting authority may, after notice and opportunity for public participation provided under ~~§70.7(h)~~ § 71.11, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other part ~~70~~ 71 permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the permitting authority shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of paragraph (f) of this section, the source shall be subject to enforcement action for operation without a part ~~70~~ 71 permit if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in ~~regulations promulgated under title IV of the Act.~~ 40 CFR parts 72 through 78.

(2) Part ~~70~~ 71 sources that would qualify for a general permit must apply to the permitting authority for coverage under the terms of the general permit or must apply for a part ~~70~~ 71 permit consistent with § ~~70~~71.5. The permitting authority may, in the general permit, provide for applications which deviate from the requirements of § ~~70~~71.5, provided that such applications meet the requirements of title V of the Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. Without repeating the public participation procedures required under

96

~~§70.7(h)~~ § 71.11, the permitting authority may grant a source's request for authorization to operate under a general permit, but such a grant shall not be a final permit action for purposes of judicial review.

(e) Temporary sources. The permitting authority may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of the permit. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

(2) Requirements that the owner or operator notify the permitting authority at least 10 days in advance of each change in location; and

(3) Conditions that assure compliance with all other provisions of this section.

(f) Permit shield.

(1) Except as provided in this part, the permitting authority may expressly include in a part ~~70~~ 71 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A part ~~70~~ 71 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this paragraph or in any part ~~70~~ 71 permit shall alter or affect the following:

(i) The provisions of section 303 of the Act (emergency orders), including the authority of the Administrator under that section;

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act; or

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

(g) Emergency provision.

(1) Definition. An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission

limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) Effect of an emergency. An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph ~~(a)(3)(iv)(B)~~ (a)(3)(iii)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

~~§70.7~~§ 71.7 Permit issuance, renewal, reopenings, and revisions.

(a) Action on application.—

(1) A permit, permit modification, or renewal may be issued only if all of the following conditions have been met:

(i) The permitting authority has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under ~~§70.6~~§ 71.6(d) of this part;

(ii) Except for modifications qualifying for minor permit modification procedures under ~~§§70.7~~paragraphs (e)(~~2~~1) and (~~3~~2) of this section, the permitting authority has complied with the requirements for public participation under ~~paragraph (h) of~~ this section or § 71.11 of this part, as applicable;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under ~~§70.8(b)~~§ 71.8(a) of this part;

(iv) —The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and

(v) ~~The~~In the case of a program delegated pursuant to § 71.10 of this part, the Administrator ~~has received a copy of the proposed permit and any notices required under §§70.8(a) and 70.8(b), and~~ has ~~not objected to issuance~~received a copy of the ~~permit under §70.8(c)~~proposed permit and any notices required under § 71.10(d) of this part and has not objected to issuance of the permit under § 71.10(g) of this part within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under ~~§70.4(b)~~§ 71.4(~~11~~i) ~~or under regulations promulgated~~of this part or under ~~title IV~~40 CFR part 72 or title V of the Act for the permitting of affected sources under the acid rain program, the ~~program shall provide that the~~ permitting authority shall take final action on each permit application (including a request for permit modification or renewal) within 18 months~~, or such lesser time approved by the Administrator,~~ after receiving a complete application.

(3) The ~~program~~permitting authority shall ~~also contain reasonable procedures to~~ ensure that priority is given to taking action on applications for construction or modification under title I, parts C and D of the Act.

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs (e)(~~2~~1) and (~~3~~2) of this section, the ~~State program~~permitting authority need not ~~require~~make a completeness determination.

(5) The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to ~~EPA and to~~ any ~~other~~ person who requests it, and to EPA, in the case of a program delegated pursuant to § 71.10 of this part.

(6) The submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under title I of the Act.

(b) Requirement for a permit. Except as provided in the following sentence, ~~§70.4(b)(12)(i)~~§ 71.6(a)(13) of this part, and paragraphs ~~70.7~~(e)(1)(v) and (2)(v) ~~and (3)(v)~~ of this section, no part ~~70~~71 source may operate after the time that it is required to submit a timely and complete application under ~~an approved permit program~~this part, except in compliance with a permit issued under ~~a~~this part ~~70 program~~. ~~The program shall provide that, if a part 70~~If a part 71 source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a part ~~70~~71 permit is not a violation of this part until the permitting authority takes final action on the permit application, except as noted in this

section. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section, and as required by ~~§70.5(a)(2)~~§ 71.5(c) of this part, the applicant fails to submit by the deadline specified in writing by the permitting authority any additional information